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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY,
APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED AUGUST 29, 1931

(36,147)

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[fol. 1] [Caption omitted]

[fol. 2]

IN CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI, TO DECEMBER RULES, 1927

Cause #—, Box #—

NATCHEZ INVESTMENT COMPANY, INC., Complainant,

vs.

J. V. & R. T. BURKES, T. J. BARTLETTE, Trustee in Bankruptcy for J. V. & R. T. Burkes; Hartford Accident & Indemnity Company, et al., Defendants

BILL OF COMPLAINT—Filed Oct. 24, 1927

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes your complainant Natchez Investment Company, Inc., a corporation, qualified to do business in the State of Mississippi and having its principal place of business at Natchez, Mississippi, and brings this its suit against J. V. Burkes and R. T. Burkes, composing the copartnership of J. V. & R. T. Burkes of New Orleans, Louisiana, and whose Post Office address is New Orleans Bank Building, New Orleans, Louisiana, and against T. J. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes, and Trustee for the individuals in Bankruptcy, J. V. Burkes and R. T. Burkes, appointed by the United States District Court for the Eastern District of Louisiana in Cause #3355 on the Docket of Edward J. Thilberger, Referee in Bankruptcy in New Orleans, Louisiana, and which Trustee's Post Office address is New Orleans Credit Men's Association, New Orleans, Louisiana; also Hartford Accident & Indemnity Company of Hartford, Connecticut, whose Post Office address is Hartford, Connecticut; and also R. Lee Parker, Jr., of Natchez, Mississippi; R. Scudamore, Jr. of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks

Parker, both of Natchez, Mississippi; Williamson-Greer, [fol. 3] a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; Acme Engineering Company of Memphis, Tennessee; New Orleans Bank & Trust Company of New Orleans, Louisiana; Feltus Brothers Hardware Company of Natchez, Mississippi; Enochs Lumber Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capitol Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; the Southern G-F Company, Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company, of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiana; Gibbens & Gordon, Inc., of New Orleans, Louisiana; Truscon Steel Company of Youngstown, Ohio; Woodward, Wight & Company, Ltd., of New Orleans, Louisiana; Schultz Cabinet Works of New Orleans, Louisiana; Natchez Drug Company of Natchez, Mississippi; Geisenberger Brothers Drug Company of Natchez, Mississippi; M. P. Phelan of Natchez, Mississippi and W. A. Jacobie Company of Dallas, Texas; and shows unto the Court the following facts in support of this petition:

(1)

That the Post Office address of the above named defendants as given is the Post Office address known to complainant after diligent search and inquiry, and that if there is any particular street address in connection with any of the above named defendants same cannot be ascertained after diligent search and inquiry.

(2)

That under date of October 18th, 1926 your complainant, Natchez Investment Company, Inc., entered into a certain agreement or contract with J. V. & R. T. Burkes of New Orleans, Louisiana for the construction of a certain building at Natchez, Mississippi, known as Project #640 on [fol. 4] the files of Weiss & Dreyfus, Inc., Architects at New Orleans, Louisiana, a copy of which contract or agreement is filed herewith and made a part hereof and marked

Exhibit "A". That said contract and agreement #640 has as a part thereof certain specifications compiled by the Architects and referred to in said contract and made a part thereof and a copy of said specifications is filed herewith and made a part hereof and marked Exhibit "B" hereto.

That said specifications contain one hundred twenty-six (126) numbered pages, numbered from #1 to #126, inclusive, and also contains three (3) pages preceding page #1, and all are bound in binder marked "Plans #640—Specifications for the Eola Hotel, a Seven Story Fire Proof Building to be erected in Natchez, Mississippi" and of said specifications on pages 18 and 19 thereof appears the following Clauses:

"Article 30

It shall be the obligation of every contractor and sub contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects; contractor likewise to pay the costs of any required recordation of contract and bond and the cost of any required cancellation of the came. He shall also secure and pay for Lien Privilege Certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become neces- [fol. 5] sary.

Guarantee.—It is the intent of the Architects to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its ac-

ceptance by the Architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of contract; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder and the owner and the Architect reserve the right to make all desired changes, alterations, and additions under the conditions and in the manner hereinbefore described, without any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations and additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be, bound to the Owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

(3)

That on October 20th, 1926, the said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted [fol. 6] provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract did furnish such a bond with Hartford Accident & Indemnity Company of Hartford, Connecticut as surety thereon.

A copy of said bond is filed herewith as Exhibit "C" and made a part hereof, the same as though fully incorporated herein, and the said bond among other provisions made the said Contract, Exhibit "A", and the said Specifications, Exhibit "B", parts of said bond; the said bond containing among other clauses the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the con-

tract) dated October 18th, 1926 to construct "Eola Hotel" Building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

(4)

That the said J. V. & R. T. Burkes proceeded to construct the said Eola Hotel under the said contract and specifications and the Natchez Investment Company, Inc. accepted the said Hotel under an agreement dated August 20th, 1927, by which the said J. V. & R. T. Burkes agreed, that notwithstanding the acceptance of the said Hotel by complainant, that should the Architects later determine that any work done in connection with the Hotel had been faulty or improperly done, or neglected, that then the said contractors, J. V. & R. T. Burkes, would be held and bound to construct, correct and supply such work, labor and material as might be determined by the Architects to be furnished, constructed, corrected or supplied on said Hotel job, and a copy of said contract is filed herewith, marked Exhibit "D" and made a part hereof for all purposes.

[fol. 7] That payments were made to the said contractors for all sums owing on the same as agreed between the said contractors and complainant, except for the sum of Four Thousand One Hundred Twenty-Two ($4,122.00) Dollars, which amount is in the hands of the Canal Bank & Trust Company of New Orleans, Louisiana, Trustee for the disbursement of the building fund that had been provided by a First Mortgage Bond Issue for the building of said Hotel. That before the disbursement of said $4,122.00 to the said J. V. & R. T. Burkes, your complainant received written notices from various persons who had supplied material to the said contractors in the building of the Eola Hotel, stating that they had not been paid, for the material furnished, and complainant here offers to have said Trustee pay said amount into Court. That said parties so furnishing said notices to complainant were the following:

R. Lee Parker, Jr., of Natchez, Mississippi.
R. Scudamore, Jr., of Natchez, Mississippi.
Natchez Brick Company of Natchez, Mississippi.
Williamson-Greer Company of Dallas, Texas.

Acme Engineering Company of Memphis, Tennessee.
Feltus Brothers Hardware Company of Natchez, Mississippi.
Enochs Lumber & Mfg. Company of Jackson, Mississippi.
The Capitol Paint & Glass Company of Jackson, Miss.
The Southern G-F Company of Atlanta, Georgia.
Chamberlain Metal Weather Strip Co., St. Louis, Mo.
Hockaday, Inc. of Chicago, Illinois.
National Show Case Company of Columbus, Georgia.
O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiana.
Gibbens & Gordon, Inc., of New Orleans, Louisiana.
Truscon Steel Company of Youngstown, Ohio.
Woodward, Wight & Company, Ltd., of New Orleans, La.
[fol. 8] Schultz Cabinet Works of New Orleans, La.
Natchez Drug Company of Natchez, Miss.
M. P. Phelan of Natchez, Miss.
W. A. Jacobie Company of Dallas, Texas.

And the amount of said claims aggregated the sum of Sixty-Two Thousand Seventy-Three Dollars and Twenty-Nine Cents ($62,073.29). That thereupon the said $4,122.00, balance owing the said J. V. & R. T. Burkes out of the construction fund, was not paid over, but still remains in the hands of the Trustee. That complainant also received notice that New Orleans Bank & Trust Company had been assigned by J. V. & R. T. Burkes part of the claim of J. V. & R. T. Burkes against complainant in connection with the construction of the said Hotel in the amount of $26,323.00, and the said J. V. & R. T. Burkes and New Orleans Bank & Trust Company had brought suit in the Circuit Court of Adams County, Mississippi, numbered $1305 on the Docket of the Circuit Court of Adams County, Mississippi, claiming the said balance to be owing on the building of the Eola Hotel and that said balance has been assigned to New Orleans Bank & Trust Company and complainant denies owing said balance on said contract.

(5)

That under the agreement, Exhibit "D" hereto, the said contractors are liable to correct improper work and faulty work done in connection with the said Eola Hotel to an amount estimated to be the value of Six Thousand ($6,000.00) Dollars.

(6)

That among the parties above mentioned as having given notice to complainant of claims against said contractors which have not been paid, is O. L. Bunn, doing business as Bunn Electric Company, who has brought suit in the Circuit Court of Adams County, Mississippi, same being num-
[fol. 9] bered #— on the Docket thereof for the sum of $— against the said contractors and your said complainant for amounts owing by the said contractors J. V. & R. T. Burkes and unpaid by them.

(7)

That Hartford Accident & Indemnity Company, one of the defendants herein has been notified that under its bond it is liable for all sums owing by the said contractors, J. V. & R. T. Burkes, in connection with the building of the Eola Hotel and has denied its liability on its said bond, claiming that its said bond is not a bond that guarantees the faithful performance of the contract, but is a bond of indemnity.

(8)

That Section 2, Chapter 128 of the Laws of 1918 for the State of Mississippi, Hemingway's Code of 1927, Section 2587 denies to any contractor the right to assign, transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of subcontractors, journeymen, laborers and materialmen as declared in said Act and provided that all such assignments, transfers or disposition shall be subordinate to the rights of subcontractors, journeymen, laborers and materialmen as well as the owner. That should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project No. 640, then in such case any assignment made by the said J. V. & R. T. Burkes to New Orleans Bank & Trust Company of the proceeds of said contract would be subordinate to the rights and claims of the subcontractors and materialmen mentioned herein, and to whom the said J. V. & R. T. Burkes owe money for material furnished in the construction of the Eola Hotel.

[fol. 10] (9)

That under said contract, specifications and bond and under the Law your complainant is entitled to bring suit against said contractors and said surety on said bond and to bring in all subcontractors and materialmen having claims for material furnished in the building of said Eola Hotel, and for which material they have not been paid by the said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifications is a bond for the faithful performance of said contract or simply a bond of indim-ity.

(11)

Complainant shows that by reason of receiving of notices as hereinabove set forth of nonpayment by said contractors or materialmen and by reason of the facts herein alleged complainant has incurred attorney's fees and that the specifications provide that the surety and bond shall be "liable for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary." That this proceeding is in the nature of a concursus proceeding and that this proceeding in necessary in order to adjudicate the rights and equities of all parties mentioned herein, and that, therefore, complainant is entitled to recover on said bond reasonable attorney's fees to be fixed and adjudicated by the Court, and complainant avers and charges should be adjudicated at the sum and amount of $5,000.00, and which amount complainant claims in this cause.

(12)

Complainant further avers and says that it is entitled to have and recover under said bond the amount and value of work necessary to be done and labor and material necessary to be furnished by said contractors to complete and maintain the said project #640 according to plans and specifications and which complainant avers is the sum of $15,000.00.

[fol. 11] (13)

Complainant further avers and charges that the parties herein named as furnishing material in connection with

said project #640 to said contractors have not been paid and are entitled to recover the amount owing to them by said contractor and to have judgment for said amount on said bond.

Premises considered, complainant prays that the said defendants above named all be summoned by proper process to the December Rules 1927 of this Honorable Court, there to plead, answer or demur to this bill and that upon a hearing of this Cause the Court a decree render adjudicating the said bonds on which Hartford Accident & Indemnity Company is surety to be bond for the faithful performance of the contract and subject to all the rights and liabilities provided by Chapter 128 Laws of 1918 State of Mississippi, and particularly Section 3 thereof, being Section 2598 Hemingway's Code for 1927 of the State of Mississippi, and render a judgment against the said contractors, the Trustee in Bankruptcy and said Hartford Accident & Indemnity Company for such sum as may be found to be necessary to complete and maintain the said project #640; also for reasonable attorney's fees for the bringing of this proceedings; also for the amounts owing to the sub-contractors and materialmen herein named and such other as may intervene in this proceeding as provided by Section 3, Chapter 128 Laws of the State of Mississippi, Section 2598 Hemingway's Code of 1927 and which amounts aggregate the sum of $100,000.00; also this Court to determine and adjudicate what amount, if anything, this complainant should pay to New Orleans Bank & Trust Company under the alleged assignment of the proceeds of said project #640 and also adjudicate whether or not said amount, or anything, should be paid to the said New Orleans Bank & Trust Company or to the said Sub-contractors and materialmen.

[fol. 12] Further prays that if complainant has asked for wrong or insufficient relief that then the Court award herein such other, further, different and general relief as may be right and proper in the premises. And in duty bound complainant will ever pray.

Engle & Laub, Sols. for Complainant.

Duly sworn to by Leon M. Levy. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 13] EXHIBIT "A" TO BILL OF COMPLAINT

The Standard Form of Agreement Between Contractors and Owner for Construction of Buildings

Issued by the American Institute of Architects for use when a Stipulated sum forms the basis of Payment.

This form of agreement has received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint conferences on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, The National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trade Employers' Association of the City of New York.—Fourth Edition, Copyright 1915-1916-1925 by the American Institute of Architects, the Octagon House, Washington, D. C. This form is to be used only with the Standard General Conditions of the contract for construction of buildings.

This agreement Made the 18th day of October, in the year Nineteen Hundred and Twenty-Six, by and between J. V. & R. T. Burkes of New Orleans, Louisiana, a copartnership composed of J. V. Burkes and R. T. Burkes, hereinafter called the Contractor and Natchez Investment Company, Inc., a corporation under the laws of the State of Louisiana, and domiciled in the Town of Vidalia in said State, with an office in the City of Natchez, Mississippi, and represented by Leon M. Levy President and M. O. Levy, Secty-Treas. hereinafter called the Owner.

[fol. 14] Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agreed as follows:

Article 1. Scope of the Work.—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications numbered #640 in the Architect's files, subject

(Here insert the caption descriptive of the work as used on the Drawings and in the other Contract Documents.)

to amendments, alterations, eliminations and changes as set forth in bulletins hereto attached, forming a part hereof,

identified by the initials of the parties hereto for reference. Prepared by Weiss and Dreyfus, Inc., Architects, acting as and in these Contract Documents entitled the Architects and shall do everything required by this Agreement, the General Conditions of the Contract, the specifications and the Drawings.

Fourth edition, 1925, Page 1.

Article 2. Time of Completion.—The work to be performed under this Contract shall be commenced at once and shall be substantially completed May 10th, 1927.

(Here insert stipulation as to liquidated damages, if any.)

It being understood, however, that no damages nor penalties of any sort are to be assessed against contractors for non-completion within the time above specified, unless contractors fail to furnish material and workmanship at a rate of progress and in a manner satisfactory to the architects.

Article 3. The Contract Sum.—The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds [fol. 15] as follows $316,822.00. (State here the lump sum amount, unit prices, or both, as desired in individual cases.)

Where the Quantities originally contemplated are so charged that the application of the agreed unit price to the quality of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the contract to prevent such hardship.

Fourth edition, 1925, page 2.

Article 4. Progress Payments.—The Owner shall make payments on account of the Contract as provided therein, as follows: On or about the 1st and 15th day of each month the value, based on the Contract prices, of Labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 1st and 15th day of each month, as estimated by the Architects less the aggregate of previous payments: Price —.

(Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.)

Article 5. Acceptance and Final Payment.—Final payment shall be due upon substantial completion of the work provided the work be then fully completed and the Contract fully performed. Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptance under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work pro- [fol. 16] vided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit Evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid. If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Fourth edition, 1925, page 3.

Article 6. The Contract Documents.—The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto or herein repeated.

The following is an enumeration of the Specifications and Drawings: 25 sheets of general drawings and details numbered No. 1 to No. 23, inclusive, and general mechanical and electrical equipment specifications consisting of 126 mimeographed pages, identified by initials of the parties hereto.

Fourth edition, 1925, page 4.

[fol. 17] In witness whereof the parties hereto have executed this agreement the day and year first above written.

J. V. & R. T. Burkes, by R. T. Burkes. Natchez Investment Company, Inc., by Leon M. Levy, Pres.; by Maurice O. Levy, Sec. & Treas. (Seal.)

Witnesses: E. O. Spencer, S. B. Laub.

Fourth edition, 1925, page 5.

[File endorsement omitted.]

[fol. 18] Plan 640, Bulletin No. 1

New Orleans, September 30, 1926.

General contractor shall include within his contract the following work:

Hardwood Floor (on Seventh Floor).—General contractor shall furnish and lay over Nailcode a 7/8" x 2", Select Grade, plain sawn, Indian Red Oak Floor: material to be side and end matched, blind nailed, tightly driven, machine finished smooth and even, carefully sanded, filled with a dark stain and filler, given two coats of shellac or approved spar varnish, waxed and polished with Johnson's floor wax using weighted brush.

Weiss & Dreyfus, Inc.

[fol. 19] Plan 640

Interior

It is the declared and acknowledged intention to erect a brick and concrete, Hotel Building, to occupy a site of ground, all shaped, with Frantages on Pearl and on Main streets in the City of Natchez, Mississippi, in accordance with these specifications, and with plans #640 to which they refer.

[fol. 20] Plan 640

Contracts

The contracts to cover the work done will be based on these specifications, and on the plans to which they refer, which will be attached hereto and form a part hereof.

[fol. 21] EXHIBIT "B"

Excerpts from Specifications

(a) The Contract Documents consist of the Agreements, the General Conditions of the Contract, the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.

(e) The term "Work" of the Contractor or Subcontractor includes labor or materials or both.

(g) The law of the place of building shall govern the construction of this Contract.

Art. 2. Execution, Correlation, and Intent of Documents.—The Contract Documents shall be signed in duplicate by the Owner and the Contractor. In case the Owner and the Contractor fail to sign the General Conditions, Drawings or Specifications, the Architect shall identify them. The Contract Documents are complementary and what is called for by one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Material or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

[fol. 22] Art. 9. Materials, Appliances, Employees.—Unless otherwise stipulated the Contractor shall provide and pay for all materials, labor, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work. Unless otherwise specified all materials shall be new and both workmanship and materials shall be of good quality. The contractor shall, if required, furnish saticfactory evidence as to the kind and quality of materials. The Contractor shall at all times enforce strict discipline and good order among his em-

ployees, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him.

Art. 26. Payments Withheld.—The Architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect the Owner from loss on account of:

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the Contractor to make payments properly to subcontractor or for material or labor,

(d) A reasonable doubt that the contract can be completed for the balance then unpaid.

(e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

[fol. 23] Article 30. Guaranty Bond.—The Owner shall have the right, prior to the signing of the contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto it shall be paid by the Owner.

[fol. 24] Article 32. Liens.—Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify him against any lien. If any lien remain un-

satisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

Art. 33. Assignment.—Neither party to the Contract shall assign the contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

[fol. 25] The Contractor agrees—

(d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.

(e) To pay the Subcontractor, upon the issuance of certificates, if issued, under the schedule of values described in Article 24 of the General Conditions the amount allowed to the Contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.

(f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e) so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the Contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the Contract Documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the Architect fails to issue it for any cause not the fault of the subcontractor.

[fol. 26] Article 30

It shall be the obligation of every contractor and subcontractor estimating upon work under this contract oper-

ation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect, contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for Lien and Privilege certificates which will be required of him before final payment is made under this contract. The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall profect for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Obligations of Bondsmen.—The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their [fol. 27] obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations, and additions in the manner specified without notice to the Contractor's surety, and waiver of such notice shall not affect the validity of the bond. The sureties for the various contractors shall be and are hereby declared and acknowledge themselves to be, bound to the Owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing.

[fol. 27a] EXHIBIT "C" TO BILL OF COMPLAINT

Hartford Accident and Indemnity Company, Hartford, Connecticut

Know all men by these presents: That J. V. & R. T. Burkes, a co-partnership composed of J. V. and R. T.

Burkes, of New Orleans, La., of —— (hereinafter called the Principal) as principal and the Hartford Accident & Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, of Hartford, Connecticut (hereinafter called the Surety) as surety, are held and firmly bound unto Natchez Investment Company, Inc., Natchez, Mississippi, of —— (hereinafter called the Obligee) in the sum of Three Hundred Sixteen Thousand Eight Hundred Twenty-two & no/100 ($316,822.00) Dollars, for the payment whereof the Obligee the Principal and the surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Signed, sealed and dated this 20th day of October, 1926, Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18th, 1926, To construct "Eola Hotel" building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof. Now, therefore, the condition of this obligation is such that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the sur-ty, upon the following express conditions, which shall be precedent to the right of recovery hereunder.

[fol. 27b] 1. The Obligee, shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof, and if the obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

2. If the principal shall in any manner default in the performance of any matter or thing specified in the contract, or if the principal shall abandon the work provided in the contract on the part of the Principal to be done, the obligee shall immediately so notify the surety and thereafter the surety shall have the right at its option to assume, or assume and sublet, the contract and to proceed thereunder as if no default or abandonment had occurred,

and in such event all moneys agreed in the contract to be paid the principal and which at the time of default or abandonment are unpaid the principal and which at the time of default or abandonment are unpaid by the obligee shall thereupon belong and become payable to the surety and shall be paid to it.

3. If at any time there come to the notice or knowledge of the obligee information that any claim for labor performed or for materi*sla* furnished the principal in or upon the work specified in the contract remains unpaid, or that any lien or notice of lien for such work or materials has been filed or served, the obligee shall withhold from the principal payment of any moneys due or to become due to the principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the surety, giving a statement of the particular facts and amount of each such claim lien or notice of lien.

4. If any changes or alterations by the principal or obligee shall be made in the plans or specifications for the work described in the contract, the obligee shall immediately notify the surety thereof, giving a description and stating the amount of money involved by such changes or altera- [fol. 27c] tions. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10% of the penal sum of this bond, no further changes, or alterations shall be made by the principal or obligee until the consent of the surety shall first be obtained thereto.

5. In the event of the destruction of or injury to the work specified in the cont*t*act by fire, by riot, mob, the elements, earthquake, cyclone, tornado, lightning, public enemy or any act of God or through so called strikes or labor difficulties the surety shall not be liable for any loss or damage whatsoever resulting therefrom.

6. This bond does not apply to nor cover guarantees of the work specified in the contract; nor of its efficiency; nor of the wearing qualities thereof; nor for maintenance of or repairs thereto hereinafter specifically agreed to as being covered by this bond; nor for the furnishing of any bond; nor to the payment of any damages or compensations either at common law or under any stat-

ute, Federal or State, arising from or growing out of injuries to persons or property; nor for failure to procure insurance or to comply with any statute covering such damages or compensation; nor the furnishing of any policy of insurance; nor for damages caused by delay in completing the work except such damages as have actually been sustained and proved.

7. The surety shall not be liable for the infringement of any patent or for the validity of any letters patent granted by the United States in connection with any article which is required by the Contract to be furnished by the principal; nor shall the surety be liable hereunder unless the consideration paid by the obligee to the principal for the performance of the contract shall be cash.

[fol. 27d] 8. None of the conditions or provisions contained in this bond shall be deemed waived or altered by the surety unless the written consent to such waiver or alteration be duly executed by its authorized officer and its seal be duly affixed thereto; nor shall the obligee consent to an assignment of the contract or any part thereof without the express consent of the surety duly executed and attested as aforesaid; nor shall this bond or any rights thereunder be assignable except with the consent of the surety duly executed and attested as aforesaid.

9. No action, suit or proceeding shall be had or maintained against the surety under this bond unless it shall be brought or instituted and process served upon the surety within six (6) months after the contract and in no event after six (6) months subsequent to the date, time or period fixed in the contract for the completion of the work specified, therein.

10. All notices and other evidence required by this bond to be furnished by the obligee to the surety shall be in writing and shall be forwarded by registered mail to the surety at its principal office in Hartford, Connecticut.

11. No right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee named herein; and the obligation of the surety is and shall be construed strictly as one of suretyship only.

J. V. & R. T. Burkes, Principal, by —— ——. Hartford Accident and Indemnity Co., by E. O. Spencer, Attorney-in-fact.

Witness: —— ——, of individual.
Attest: —— ——, if Corporation.

Copy of Original.

[File endorsement omitted.]

[fol. 28] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

ANSWER AND CROSS-BILL

To the Honorable Chancery Court of Adams County Mississippi:

Now comes the Defendant, St. Bernard Cypress Company, Ltd., and for answer to the bill of complaint filed herein, or unto so much or such parts thereof as this Defendant is advised is material for him to make answer unto, he answers and says:

I

Defendant admits the allegations contained in paragraph #1 of said bill of complaint.

II

Defendant further admits that under date of October 18, 1927, the Complainant, Natchez Investment Company, Inc., entered into a contract with J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as project #640 on the files of Weiss & Dreyfus, Inc., Architects, at New Orleans, Louisiana, a copy of which contract or agreement is filed with the original bill of complaint in this cause and is adopted and made a part of this answer, and prayed to be taken as a part hereof the same as though copied in full herein. Defendant further admits and herein charges and avers that said contract and agreement #640 has as a part thereof certain specifications compiled by the Architects and referred to in said contract and made a part thereof. A copy of said specifications having been filed as Exhibit

"B" with said original bill of complaint, is made a part hereof the same as though incorporated at length herein.

[fol. 29] III

Said Defendant further admits that said specifications contain one hundred and twenty six (126) numbered pages numbered from #1 to #126 inclusive, and also contain three (3) pages preceeding page #1 and are all bound in a binder marked "Plants #640 Specifications for the Eola Hotel, a seven story Fire Proof Building to be erected in Natchez, Mississippi," and of said specifications on pages 18 and 19 thereof appears the following clauses:

"Article 30

It shall be the obligation of every contractor and subcontractor estimating upon work under this contract operation to figure to include within his bid to furnish a bond in the sum and conditioned as the Law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect; contractors likewise to pay the cost of any required recordation of contract and bond and the cost of any requited cancellation of the same. He shall also secure and pay for lien and Privilege certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect the Owner against all liens or claims that may be filed against the building according to the Laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee.—It is the intent of the Architects to secure first class permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its [fol. 30] acceptance by the Architects. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the

Architects previous to the signature of contractor; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications and of the contracts covering the work executed hereunder and the Owner and the Architects reserve the right to make all desired changes, alterations and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations and additions in the manner specified without notice to the contractors surety, and waiver of such notice shall not effect the validity of the bond.

The surety for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as guarantors, separately and in solido with the contractors of the fulfillment of the terms of the foregoing."

IV

Defendant further admits that on October 20, 1926, the said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract, did furnish such a bond with Hartford Accident & Indemnity Company of Hartford, Connecticut, as surety thereon. A copy of said bond having been filed as Exhibit "C", to said bill of complaint, and made a part thereof, is now also made a part hereof the same as though fully incorporated herein. And, said defendant further admits, charges and avers [fol. 31] that said bond among other provisions contained therein, made the said Contract, Exhibit "A", and the Specifications, Exhibit "B", parts of said bond; and incorporated the same in the terms, stipulations and conditions of said bond; the said bond containing among other clauses, the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the con-

tract) dated October 18th, 1926 to construct "Eola Hotel" Building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto and is hereby referred to and made a part hereof."

V

Defendant further admits that the said J. V. and R. T. Burkes proceeded to construct the said Eola Hotel under said contract and specifications and that the Natchez Investment Company, Inc., accepted the said hotel, but this Defendant not being advised as to the terms of the agreement of August 10, 1927, referred to in paragraph #4 of said bill of complaint, neither admits nor denies that such an agreement was made and that the terms and effects thereof were as alleged in said bill of complaint. Defendant is informed and believes that certain payments were made to said contractors for certain sums owing to them under their contract with said complainant for the erection of said Eola Hotel, but this Defendant emphatically denies that payments were made to said contractors, the said J. V. & R. T. Burkes, for all sums owing under said contract and agreement referred to in paragraph #4 of said bill of complaint, except the sum of Four Thousand One Hundred and Twenty-Two ($4,122.00) Dollars, which said bill of complaint avers to be in the hands of the Canal Bank & Trust Company, of New Orleans, La., Trustee for the disbursement of the Building Fund, that was provided by a first Mortgage Bond Issue for the Building of said [fol. 32] Hotel, but this Defendant charges and avers upon information and belief that there is now in the hands of said Natchez Investment Company, Complainant, the sum and amount of Sixty Four Thousand Nine Hundred Eighty Eight Dollars, (#54,988.26) and Twenty-six cents, which is due and owing and unpaid by said Complainant to said J. V. & R. T. Burkes, and which is made up of certain independent indebtedness alleged and purported to have been assumed by the said Natchez Investment Company, for and on behalf of said Defendants, J. V. & R. T. Burkes, and which was by said Complainant, Natchez Investment Company, Inc., never been paid to said Defendants, J. V. & R. T. Burkes, nor any other person, but still an outstanding

indebtedness from said complainant to said last mentioned Defendants on their contract for the construction of said Eola Hotel Building, to-wit:

(1) Williamson-Greer Company, a partnership composed of Walter Williamson and A. A. Greer, of Dallas, Texas, in connection with the furnishing of material and work done in the construction of the Eola Hotel, and which indebtedness is in the sum of $12,815.10, and is represented by promissory note of the Natchez Investment Company, Inc.

(2) The indebtedness owing to Acme Engineering Company, of Memphis, Tennessee, a business of which A. W. Moore is the proprietor and which indebtedness is the sum of $14,805.96, and is represented by promissory note of Natchez Investment Company, Inc. The said note is held by Britton & Koontz National Bank, as collateral security.

(3) Indebtedness owing by J. V. & R. T. Burkes to R. Lee Parker Jr., in the sum of $1,829.70 for material furnished in connection with the construction of the Eola Hotel, and for which indebtedness said R. Lee Parker, Jr., holds claim against said contractors and this company.

[fol. 33] (4) The indebtedness owing to R. Scudamore, Jr., in the sum of $1,134.00 by said J. V. & R. T. Burkes for the furnishing of material used in the construction of the Eola Hotel, and for which indebtedness the said R. Scudamore Jr., holds a claim against said contractors and against this Company.

(5) The indebtedness owing to Natchez Brick Company, of Natchez, Mississippi, in the sum of $3,958.50 for the furnishing of material used in the construction of the Eola Hotel and for which claim the Natchez Brick Company holds against the said J. V. & R. T. Burkes, contractors, and against this company.

Total, $34,543.26;

Amount of notes favor of New Orleans Bank & Trust Company (assigned), $26,323.00,

added to which the sum of $4,122.00 admitted by Complainant in its bill of Complaint, to be in the hands of the Canal Bank & Trust Company, as a part of said Building Fund,

makes a total of $64,988.26, now owing by said Complainant to said J. V. and R. T. Burkes, and on which this Defendant has a lien to the amount of said indebtedness has a lien on said Eola Hotel Building. And, said Defendant admits that said Complainant received ~~written~~ notice from various persons who had supplied material to said contractors in the building of said Eola Hotel, stating that they had not been paid for the material furnished, and said Defendant avers that such notice was given through its attorney in the 24 day of October, 1927. Defendant admits that the name of the parties so furnishing said notices to Complainant were those names set out in Paragraph #4 of said bill of complaint, including also Geisenberger Bros. Drug Co., of Natchez, Mississippi, and St. Bernard Cypress Company, Ltd., whose names do not appear in the list of names [fol. 34] set out in said bill of complaint. Defendant not being advised as to the aggregate amount of said claim does not admit the same to be the sum of $62,073.29, as charged in said bill of Complaint, but demands strict proof thereof from said Complainant. Defendant further admits that Complainant received notice that there had been assigned to New Orleans Bank & Trust Company, by J. V. & R. T. Burkes, a part of the claim of said J. V. & R. T. Burkes, against complainant, in connection with the construction of said Eola Hotel, in the amount of $26,323.00 and that said J. V. & R. T. Burkes and New Orleans Bank & Trust Company have brought suit in the Circuit Court of Adams County, Mississippi, numbered #1305 on the Docket of said Court, claiming the said balance to be owing on the building of the Eola Hotel, and that said balance has been assigned to New Orleans Bank & Trust Company. But, this Defendant charges and avers that said assignment is subordinate to and effectual against all claims and demands of this Defendant.

VI

Defendant neither admitz nor denies the allegations contained in paragraph #5 of said bill of complaint, but demands strict proof thereof.

VII

Defendant admits the allegations contained in Paragraph #6 of said Bill of Complaint.

VIII

Defendant admits that Hartford Accident & Indemnity Company, one of the Defendants herein, has been notified that under its bond it is liable for all sums owing by said contractors, J. V. & R. T. Burkes, in connection with the building of said Eola Hotel, and that said Defendant has denied its liability on its said bond, claiming as it is alleged, that its said bond is not a bond that guarantees the faithful performance of said contract, but is a bond of indemnity.

[fol. 35] IX

Defendant further admits "That section 2, Chapter 128 of the Laws of 1917 for the State of Mississippi, Hemingway's Code 1927, Section 2597 denies to any contractor, the right to assign transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of subcontractors, journeymen, laborer- and material men as declared in said Act and provides that all such assignments, transfers or dispositions shall be subordinate to the rights of subcontractors, journeymen, laborers and material men as well as the owner.

That should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project #640, then in such case any assignment made by the said J. V. & R. T. Burkes to New Orleans Bank & Trust Company of the proceeds of said contract would be subordinate to the rights and claims of the subcontractors and mayerialmen mentioned herein, and to whom the said J. V. & R. T. Burkes owe money for material furnished in the construction of the Eola Hotel."

X

Said defendant further admits that under said contract, specifications and bond and under the Law, said Complainant is entitled to bring suit against said contractors and the surety on said bond, and to bring all subcontractors and material men having claims for material furnished in the building of said Eola Hotel, and for which material they have not been paid by said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifica-

tions is a bond for the faithful performance of said contract of simply a bond of indemnity, and this Defendant avers that he also has the same rights in the premises.

[fol. 36]

XII

Defendant admits all of the allegations contained in paragraph #11 of said bill of complaint, except however, that said Defendant neither admits nor denies that the attorneys fees to be fixed and adjudicated by the court should be adjudicated at the sum and amount of Five Thousand ($5,000.00) Dollars, but charges that the amount of same should be fixed by said Court at such price as the Court shall deem reasonable and proper.

XIII

Defendant neither admits nor denies that Complainant is entitled to have and recover under said bond the amount and value of work necessary to be furnished by the contractors to complete the said project #640 according to plans and specifications, and which complainant avers is the sum of Six Thousand ($6,000.00) Dollars.

XIV

Defendant further admits that the parties named in said bill of complaint and the additional names set out in paragraph #4 of this answer, who furnished material in connection with project #640 to said contractors, have not been paid, and are entitled to recover the amount owing them by said contractors, and to have judgment for said amount against said contractors and the surety on its bond.

Cross-bill

And this Defendant having made full answer to the bill of complaint, filed herein, makes his answer a cross bill reiterating and recharging all of the averments in said answer contained, for cause of complaint by way of cross bill herein against said complainant and all parties to said suit, and for cross bill of complaint, cross complainant respectfully shows unto the court the following, to-wit:

[fol. 37]

I

That he is a resident of Arabie Post Office, State of Louisiana, and that the names and addresses of the cross de-

fendants in this bill of complaint are as follows:— Natchez Investment Company, a corporation under the Laws of the State of Louisiana, qualified and doing business in the State of Mississippi, and having its principal place of business at Natchez, Mississippi; J. V. Burkes and R. T. Burkes, composing the partnership of J. V. & R. T. Burkes of New Orleans, Louisiana, whose postoffice address is New Orleans Bank Building, New Orleans, Louisiana; J. V. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes, and Trustee for the individuals in bankruptcy, appointed by the United States District Court for the Eastern District of Louisiana, for cause #3355, on the Docmet of Edward J. Thilborger, Referee in Bankruptcy, New Orleans, Louisiana, said Trustee's postoffice address being New Orleans Credit Men's Association, New Orleans, Louisiana; Hartford Accident & Indemnity Company, of Hartford, Connecticut; whose postoffice address is Hartford Connecticut; R. Lee Parker Jr., of Natchez, Mississippi; R. Scudamore, Jr., of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks Parker, both of Natchez, Mississippi; Williamson-Greer, a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; Acme Engineering Company, of Memphis, Tennessee; New Orleans Bank & Trust Company, of New Orleans, Louisiana; Feltus Bros., Hardware Company of Natchez, Mississippi; Enochs Lumber & Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capital Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; The Southern C. F., Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip [fol. 38] Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company, of New Orleans, Louisiana; Gibbons & Gordon, Inc., of New Orleans, Louisiana; Truston Steel Company, of Youngstown, Ohio; Woodward Wight Company, Ltd., New Orleans, Louisiana; Schultz Cabinet Works of New Orleans, Louisiana; Natchez Drug Company, of Natchez, Mississippi; Geisenberger Bros. Drug Company, of Natchez, Mississippi; M. P. Phelan, of Natchez, Mississippi, and St. Bernard Cypress Co., Ltd., of Arabi, Louisiana.

II

That under date of October 18, 1926, said Defendants, J. V. & R. T. Burkes, entered into a certain contract and agreement with the Defendant, Natchez Investment Company, Inc., for the construction of said Eola Hotel Building, at Natchez, Mississippi, as alleged in said bill of complaint, and the answer of this cross-complainant as Defendant in this cause, which contract was designated and known as Project #640 on the files of Weiss & Dreyfus Inc., Architects at New Orleans, Louisiana, a copy of which contract has been filed herewith and made a part hereof, together with the specifications compiled by the Architects and referred to in said contract and made a part thereof, also filed herewith as an exhibit to the foregoing answer and is also made a part of this cross-bill.

III

That in compliance with the terms of said contract and said specifications, said Defendants, J. V. & R. T. Burkes entered into a bond with the said cross-defendant, Natchez Investment Company, Inc., and under the terms and stipulations and conditions of the specifications made a part of said contract and the bond with Hartford Accident & Indemnity Company, as surety, in compliance there- [fol. 39] with, proceeded to construct and did construct said Eola Hotel and name was accepted by the Natchez Investment Company on or about August 10, 1927. That cross-complainant at the special instance and request of said Defendant, J. V. & R. T. Burkes, furnished and delivered unto them labor and material during the time of their construction of said Eola Hotel, as the contractors therefor, on the dates and in the amounts shown on the itemized accounts hereto attached, and marked Exhibit "A" to this cross-bill and made a part thereof the same as though copied in full herein. That as shown by said itemized statement there is due to cross complainant by said Defendants, J. V. & R. T. Burkes and the Hartford Accident & Indemnity Company, as surety, on the bond aforesaid, the sum of Two Hundred Eighty Four Dollars, all of which is now due, owing and unpaid from said last named Defendants to cross-complainant. That all of said

labor and material so furnished to said J. V. & R. T. Burkes was used by them in the erection and construction of said Eola Hotel Building. That on the 24 day of October, 1927, cross complainant gave notice to said Natchez Investment Company, Inc., and the Eola Hotel Company, that they had furnished said labor and material and that the amount due therefor was unpaid. Said notice having been given in conformity with Hemingway's Code, 1927, Section 2596 (Laws 1918, ch. 128).

V

Cross-complainant further charges and avers that the bond executed by the Defendants, J. V. & R. T. Burkes, with the Hartford Accident & Indemnity Company, as surety thereon, was given in compliance as hereinabove alleged, with the contract and specifications for the construction of said Eola Hotel, and in compliance and conformity with Section 2598, Hemingway's Code 1927 (Sec. — Laws 1918, Ch. 128). That under the terms and conditions of said contract, specifications and bond, hereinabove mentioned, [fol. 40] and under the laws of the State of Mississippi, the said Defendants, J. V. & R. T. Burkes, became obligated to promptly pay to cross complainant the amounts of said Eola Hotel. And, upon default in the payment thereof, by said Defendants, J. V. & R. T. Burkes, the said Defendant, Hartford Accident & Indemnity Company became then and there obligated to said cross complainant to pay unto him all sums due and unpaid to him by said J. V. & R. T. Burkes, for labor and material furnished for the erection and const uction of said Eola Hotel. And cross complainant further charges that default has been made by said J. V. & R. T. Burkes in the payment to cross complainant for labor and material furnished as shown by the itemized accounts hereto attached, to the sum and amount of Two Hundred Eighty Four Dollars, for the payment of which the Defendant, Hartford Accident & Indemnity Company, is bound, obligated and liable to cross-complainant; and that there is now due, owing and unpaid to said cross complainant by said Defendant, Hartford Accident & Indemnity Company, the sum of Two Hundred Eighty Four Dollars, for which cross complainant is entitled to a judgment and decree.

VI

Cross complainant further charges and avers that the Defendant, Hartford Accident & Indemnity Company, has denied its liability on the aforementioned bond, claiming that said bond is not a bond that guarantees the faithful performance of the contract between said J. V. & R. T. Burkes, and the Natchez Investment Company, Inc., but is a bond of indemnity on which said Defendant, Hartford Accident & Indemnity Company is not liable. But, yet denying this contention of said last named Defendant and again charging it to be liable upon its bond aforesaid, in the full penalty thereof, cross complainant further charges:

[fol. 41]

VII

That said Defendants, J. V. & R. T. Burkes, have made an assignment to New Orleans Bank & Trust Company of a part of the claim and amount due said J. V. & R. T. Burkes, by said Natchez Investment Company, Inc., for the construction of said Eola Hotel in the sum and amount of Twenty Six Thousand Three Hundred Twenty Three ($26,323.00) Dollars, which cross complainant is advised and believes and charge is in the form of a note, or notes for said amount, executed by said Natchez Investment Company, Inc., and payable to said Defendants, J. V. & R. T. Burkes, or to the New Orleans Bank & Trust Company. And, Cross complainant further charges and avers that should it be held and determined by the Court that the bond given by said J. V. & R. T. Burkes, with the Hartford Accident & Indemnity Company, as surety, is not a bond guaranteeing the faithful performance of said contract as contemplated by Section 3, Chapter 128 of the Laws of 1918, but is a bond only of indemnity, then cross complainant charges that by virtue of Section 2, Chapter 128 of the Laws of 1918, said J. V. & R. T. Burkes were without right to assign, transfer or otherwise dispose of, in any way, the contract for the construction of said Eola Hotel, or the proceeds thereof, to the detriment or prejudice of cross complainant, or any other subcontractors, journeymen, laborers, and materialmen, and that such assignment is subordinate to the rights and lien of cross-complainant. And, cross complainant charges and avers that said assignment by said J. V. & R. T. Burkes to said

New Orleans Bank & Trust Company is greatly to the detriment and prejudice of cross complainant, and as above charges, is subordinate to all claims and liens held by this cross complainant against said J. V. & R. T. Burkes, and the proceeds due them for the construction of said Eola Hotel. And, cross complainant further charges and avers that in event this Court shall hold said [fol. 42] bond to be a bond only of indemnity, then cross complainant is entitled to have a lien declared in its favor for the proportionate amount of its claim against said Eola Hotel Building superior to all mortgages, deeds of trust and bond issues thereon, and against the said sum of Twenty Six Thousand Three Hundred Twenty Three ($26,323.00) Dollars, with interest thereon at the rate of 6% per annum from the date of said assignment, and is entitled further to a decree of this Court adjudicating said assignment to be subordinate to the claims of cross complainant, and to a decree and judgment against said New Orleans Bank & Trust Company for the full amount of said assignment, with interest as aforesaid.

VIII

Cross Complainant further shows that said cross defendant, Natchez Investment Company, made, executed and delivered to S. B. Laub, Trustee, a deed of trust purporting to secure a bond issue amounting to the principal sum of Thirty Thousand ($30,000.00) Dollars, which deed of trust is not dated but was filed for record in the office of the Clerk of the Chancery Court of Adams County, Mississippi, on March 21st, 1927, and is recorded in Book 14, page 478 of the Records of Mortgages and Deeds of Trusts on lands in Adams County, Mississippi, and that this deed of trust purports to be a second mortgage upon the Eola Hotel Investment Building and premises and other properties of the Natchez Investment Company, Inc., being second and subordinate of record to a prior bond mortgage dated October 21, 1927, and recorded in Book 14, page 155 of said Deed of Trusts Records, securing an issue of serial bonds in the aggregate principal sum of Three Hundred Five Thousand Dollars. And cross complainant further shows that by instrument of writing dated July 23,

1927, recorded in Book 15, page 140 of said Records of Mortgages on Lands, said Natchez Investment Company, Inc., made, executed and delivered to Alvin Laub, Trustee, and to J. V. & R. T. Burkes, et al c. q. t., a certain alleged [fol. 43] deed of trust purporting to secure various customers of the Natchez Investment Company, Inc., of their alleged accounts against the Natchez Investment Company, by a deed of trust upon said Eola Hotel Building and premises, and other properties of said Natchez Investment Company, and which purports to be a third mortgage upon said property.

IX

And cross complainant now charges and avers that the purported deed of trust or mortgage from the Natchez Investment Company, Inc., to S. B. Laub, Trustee, bearing no date but which was acknowledged March 18, 1927, and is recorded in Book 14, page 478 of said mortgage Records, being the same hereinabove referred to and purporting to secure and issue of serial bonds in the aggregate principal sum of Thirty Thousand ($30,000.00) Dollars, is a false and fraudulent conveyance made without consideration inuring to said Natchez Investment Company, Inc., and the same was made with the design and intent to hinder and defraud the creditors of the said Natchez Investment Company, Inc., and that this cross complainant is entitled to have the same annulled and avoided.

X

And this cross complainant further charges and avers that that certain deed of trust made and executed by said Natchez Investment Company, Inc., to Alvin Laub, Trustee, and J. V. & R. T. Burkes, et al c. q. t., under date of July 23, 1927, and recorded in Book 15, page 140 of said Mortgage Records above referred to, is a false and fraudulent conveyance of the property therein attempted to be conveyed as security to the several claimants therein named, and that the same was prepared, drawn, executed and placed on record by the said Natchez Investment Company, [fol. 44] Inc., without the knowledge, consent or approval of any of the beneficiaries named therein, including this cross complainant, and that the same was made, executed and placed of record without any valuable consideration

inuring to said Natchez Investment Company, Inc., and that the same is so drawn and contained such provisions instead of protecting and securing the rights of the creditors named therein, as beneficiaries, the same in truth and in fact, is a subterfuge designed for the protection of said Natchez Investment Company, Inc., and designed, executed and recorded for the purpose of hindering and delaying the creditors of the Natchez Investment Company, Inc., and for the purpose of wrongfully depriving certain of the creditors of said Natchez Investment Company, Inc., of their just rights and remedies in enforcing their claims against said Natchez Investment Company, Inc., and that the same reserves to the Natchez Investment Company, Inc., an advantage inconsistent with its avowed purpose by attempting to deprive certain creditors of said Natchez Investment Company, Inc., of their rights to enforce collection of their claims against said Natchez Investment Company, Inc., and by further placing full power for the enforcement of the lien purported to be created by said deed of trust in the discretion and option of the Trustee therein named, by the Natchez Investment Company, Inc., and this cross complainant charges and avers that it is entitled to have the same annulled and avoided; cross complainant further avers that it is advised by the Natchez Investment Company, Inc., by L. Levy, Joseph Levy, M. O. Levy and Leon Levy and S. B. Laub, as to who, if anyone, holds bonds purporting to have been issued and secured by said deed of trust in favor of S. B. Laub, as Trustee, recorded in Book 14, page 478 of the Mortgage Records of Adams County, Mississippi, above mentioned and for the purpose of obtaining said information of said cross defendants, this cross complainant prays discovery of them [fol. 45] as to these facts and further for what purposes said bonds were issued and for what consideration, if any.

XI

Cross Complainant here again reiterated and recharges all of the allegations contained in paragraph # 5 of its foregoing answer, made a part of this cross bill. And, now charges and avers that said Natchez Investment Company, Inc., is indebted to said Defendants, J. V. & R. T. Burkes, in the sum of Sixty Four Thousand Nine Hundred and Eighty Eight Dollars and Twenty Six Cents ($64,988.26),

which is made up of various alleged indebtedness of said J. V. & R. T. Burkes to the persons, firms and corporations mentioned in paragraph # 5 of said answer and which said Natchez Investment Company, Inc., illegally assumed to the prejudice and detriment of this Cross complainant to the prejudice of those parties to whom said indebtedness is alleged to be owing, and cross complainant further charges and avers that the sum last above mentioned has never been paid to said Defendant-, J. V. & R. T. Burkes, nor to any other person by said Natchez Investment Company, but is at this moment an outstanding indebtedness from said complainant to said Defendants, J. B. & R. T. Burkes, on their contract for the construction of said Eola Hotel Building, and cross complainant charges and avers that it is entitled to a lien against said sum of Sixty Four Thousand Nine Hundred and Eighty Eight Dollars and Twenty Six Cents ($64,988.26), in the hands of the Natchez Investment Company, Inc., and against said Eola Hotel Building, to the extent of its proportionate share of said sum.

XII

The premises considered, cross complainant prays that all parties made Defendants to this cross bill be cited by [fol. 46] proper *per* process of this Honorable Court, to be and appear at the January, 1928, Term hereof, then and there to plead, answer or demur to this cross bill, answer under oath being waived, except as to Paragraphs VIII, IX and X of said cross bill wherein a discovery is sought from said Defendant, Natchez Investment Company, Inc., and that upon the hearing of this cause, may it please the Court to grant unto cross complainant a personal judgment and decree against defendants, J. V. & R. T. Burkes, and the Trustee in Bankruptcy, and the defendant, Hartford Accident & Indemnity Company, in the full sum*s* of Two Hundred Eighty Four Dollars. And that this Honorable Court will render a decree against the Natchez Investment Company, Inc., in favor of cross complainant for its proportionate share of all moneys in the hands of said Natchez Investment Company, Inc., due, owing and unpaid, by said company to defendants, J. V. & R. T. Burkes, and to this extent declare and establish a lien in favor of said cross complainant against and upon said

Eola Hotel Building and said funds in the hands of said Natchez Investment Company, Inc., superior to all mortgages, deeds of trust and bond issues on said hotel building.

XIII

And cross complainant further prays that this Honorable Court will interpret and construe the bond given by said J. V. & R. T. Burkes with Hartford Accident & Indemnity Company, as surety thereon, and order, adjudge and decree the same to be not simply a bond of indemnity but such a bond as is contemplated by Section 3 of Chapter 128 of the Laws of 1918, guaranteeing the prompt payment to complainant and all other persons furnishing labor and material to said Defendants, J. V. & R. T. Burkes, in the erection and construction of said Eola Hotel: And, cross complainant prays in the alternative, that if said Court [fol. 47] construes this bond to be a bond only of indemnity and not a bond guaranteeing the payment of the sums due by said J. V. & R. T. Burkes, to cross complainant, and other persons furnishing labor and material to them in the erection and construction of said Eola Hotel, then in such event, this Honorable Court do render a decree declaring said assignment by said Burkes to New Orleans — & Trust Company to be subordinate to all of the rights and liens, claims and demands of this cross complainant against said J. V. & R. T. Burkes, and against the proceeds of said assignment; and that the Court do further render a personal judgment and decree against said New Orleans Bank & Trust Company in favor of cross complainant for its proportionate share of the amount of said assignment, with interest thereon at the rate of 6% per annum from the date of said assignment.

And cross complainant further prays that in such event this Court will further declare the purported deed of trust or mortgage from the Natchez Investment Company, Inc., to S. B. Laub, Trustee, recorded in Book 14, page 478 of said Mortgage Records, and the deed of trust from said Natchez Investment Company, Inc., to Alvin Laub, Trustee, recorded in Book 15 page 140 of said records, to be fraudulent and void, as to cross complainant.

And that the Court do by proper order and decree set the same aside and declare it to be of no effect whatsoever,

as against the rights and lien of cross complainant, and that discovery be made by said Natchez Investment Company, Inc., as to who, if anyone, holds bonds purporting to have been issued and secured by said deed of trust in favor of S. B. Laub, as Trustee, recorded in Book 14 page 478 of said Mortgage Records, and for what purpose said bonds were issued and for what consideration, if any, and as to the disposition and use of the proceeds of said bonds. [fol. 48] And cross complainants further prays that this Court do further decree that the purported assumption of indebtedness of said defendants, J. V. & R. T. Burkes, by said Natchez Investment Company, Inc., to be null and void, and of no effect against the rights, claims and liens of cross complainant, and that to the total amount of said indebtedness, made up of the amount shown in said answer as owing to:—Williamson-Greer Company, Acme Engineering Co., R. Lee Parker, Jr., R. Scudamore, Jr., and Natchez Brick Company, in addition to the Twenty Six Thousand Three Hundred Twenty Three Dollars ($26,323.00), assigned to the New Orleans Bank & Trust Company, and the Four Thousand One Hundred Twenty Two Dollars ($4,122.00) admitted by complainant to be in the hands of Canal Bank & Trust Company, this Complainant is entitled and decreed to have a lien against said Eola Hotel Building for the proportionate amount of its claim and on equal footing with all other subcontractors, journeymen, etc., furnishing labor and material to said defendants, J. V. & R. T. Burkes.

And cross complainant further prays that this Honorable Court will determine and adjudicate the rights of all parties to this suit, and establish, declare and protect the liens of cross complainant, and other parties hereto, having like liens, and that this Court also establish and determine the properties, if any, of said liens.

And cross complainant prays for such other, further and different relief, both general and special, in the premises, as from the nature of its case, he shall be entitled, and as this Court shall deem meet and proper in acordance with the equities herein.

St. Bernard Cypress Company. W. A. Geisenberger, Atty.

[fol. 49] *Duly sworn to by W. A. Geisenberger. Jurat omitted in printing.*

Before me, the undersigned authority, personally came and appeared, J. J. Vetter, who being duly sworn deposes and says: He is manager of St. Bernard Cypress Company, Ltd.; that as such he is familiar with the books and accounts of said Company; that the annexed itemized statement showing an indebtedness due by J. V. & R. T. Burkes, Contractors, to St. Bernard Cypress Company, Ltd., of Two Hundred Eighty-four Dollars and no cents ($284.00), is correct.

J. J. Vetter, Manager.

Sworn to and subscribed before me this 21 day of Oct., 1927. R. E. Millens, Jr., Notary Public. (Seal.)

[fol. 50] In Chancery Court of Adams County

Demurrer of Hartford Accident & Indemnity Company to Bill of Complaint—Filed Jan. 9, 1928

[Title omitted]

Demurrer of the Hartford Accident and Indemnity Company to the original bill of complaint and to the interventions of the Interstate Electric Company of New Orleans, La., and the Coburn Trolley Track Manufacturing Company and Weis, Dreyfus and Seiferth and to all other intervening petitions which may have been or may be filed in this cause.

Comes the Hartford Accident and Indemnity Company a defendant herein and demurs to the original bill of complaint and the petitions of intervention filed herein on the following grounds, to-wit:

1. The bill shows on its face that the bond sued on is not a performance bond within the meaning of Chapter 128 of the Laws of 1918 and the bill further shows on its face that said bond is not controlled by said law.

2. The bill further shows on its face that the bond sued on does not guarantee the faithful performance of the contract by J. T. and R. V. Burkes, within the meaning of Chapter 128, of the Laws of 1918.

3. If the bond be construed as coming within the terms of Chapter 128 of the Laws of 1918 then that law is void because it is an unwarranted interference of the freedom of contract against the following persons:

a. The owner of the property;
b. The contractor;
c. The surety of the contractor;

[fol. 51] and violates Section 1, Fourteenth Amendment of the Constitution of the United States.

4. Said act is further unconstitutional because Section 2 thereof which prohibits the assignment by the contractor of his rights, is violative of the Fourteenth Amendment to the Constitution of the United States, Section 1, in that it is an unwarranted interference with the freedom of contract by contractor.

5. Because it is not within the power of the Legislature of Mississippi to create a contract between persons sue juris.

6. Because to so construe said statute constitutes the taking of property without due process of law in violation of Section Fourteen of the Constitution of the State of Mississippi, and of Section One, of the Fourteenth Amendment to the Constitution of the United States.

7. That section of the law which requires that the contractor's bond, when given at the instance of the owner shall protect third persons not named in the bond is unconstitutional and void in that it is an attempt by the Legislature to—

a. Make a contract between persons without their consent.
b. To give a class of third persons rights without the consent of the parties to the contract and thereby constitute an absolute infringement of the freedom of contact.

8. Chapter 128 of the Laws of 1918 denies to the contractor and his surety the equal protection of the law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

9. It is not within the police power of the State to pass such an act as Chapter 128 of the Laws of 1918.

10. Said law violates Section 32 of the Constitution of the State of Mississippi because it is an impairment of the [fol. 52] liberty of contract which is retained by and is inherent in all citizens.

Wells, Stevens and Jones, Attorneys for Hartford Accident and Indemnity Company

We, the undersigned attorneys for the Hartford Accident and Indemnity Company, do hereby certify that in our opinion the foregoing demurrer is good in law and should be sustained.

Wells, Stevens and Jones.

[File endorsement omitted.]

[fol. 53] In Chancery Court of Adams County

[Title omitted]

Decree Overruling Demurrers of Hartford Accident & Indemnity Co.—Filed Jan. 27, 1928

This cause came on to be heard this day in open Court upon the demurrers of the Hartford Accident & Indemnity Co., to the original Bill and to all of the Petitions of Intervenors filed herein against said Hartford Accident & Indemnity Co. and the Court having considered said demurrer is of the opinion that they should be overruled.

It is therefore ordered, adjudged and decreed that the demurrerx of the Hartford Accident & Indemnity Co. to the original Bill of Complaint, and to all of the Petitions of Intervention filed herein, be and the same are hereby overruled.

It is further ordered, adjudged and decreed that the Hartford Accident & Indemnity Co. be and the same is hereby granted an appeal to the Supreme Court of the State of Mississippi to settle the principles of the case, upon complying with the law in such cases.

Ordered, adjudged and decreed, this 27th day of January, 1928.

R. W. Cutrer, Chancellor.

[fol. 54] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

AMENDMENT TO CROSS-BILL

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes the defendant, St. Bernard Cypress Co., Ltd., and with leave of Court first had and obtained, files as an amendment to its cross bill in this cause and as exhibit B thereto and as a part of said original cross bill, the same as if copies in full therein, a copy of the purchase orders from J. V. & R. T. Burkes, defendants to this cross complaint dated November 17, 1926, covering the lumber delivered to said defendant by cross complainant and sued on in said cross bill.

St. Bernard Cypress Co., Ltd., by W. A. Geisenberger, Atty.

[fol. 55] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS BETWEEN HARTFORD ACCIDENT & INDEMNITY COMPANY AND ST. BERNARD CYPRESS CO., LTD. —Filed July 20, 1929

The following facts are admitted to be correct on the part of the St. Bernard Cypress Company, Ltd., through its attorney, W. A. Geisenberger, and the Hartford Accident & Indemnity Company, through its attorney, L. Barrett Jones, in that certain cause styled Natchez Investment Company, Inc., complainant; vs. J. V. & R. T. Burkes, et al defendants, numbered #5323 on the general docket of the Chancery Court of Adams County, Mississippi, and this agreement may be filed in the cause as the evidentiary matter and the parties hereto to be bound by this agreement when the same is so filed in said cause as to the facts set forth and covered herein, together with the necessary conclusions deducible from said facts herein stated.

That under date of October 12th, 1926, the Natchez Investment Company, Inc., entered into a certain agreement or contract with the defendants, J. V. & R. T. Burkes of

New Orleans, Louisiana, known as Project No. 640 on the files of Weiss, Dreyfus & Seiferth, Inc., Architects of New Orleans, Louisiana, as per copy of said agreement or contract which was filed with the original bill of complaint filed in this cause and marked exhibit "A" thereto; and that the Natchez Investment Company, Inc., is a corporation incorporated under the laws of the State of Louisiana and was so at all times mentioned in the pleadings in this cause and that the said J. V. & R. T. Burkes was a [fol. 56] co-partnership consisting of J. V. Burkes and R. T. Burkes doing a general building contractors business, residents of New Orleans, Louisiana and that the Hartford Accident and Indemnity Company is a Surety Company, doing a general surety business in the State of Mississippi and qualified by its own volition to do business in said state and under the laws of said state and was so qualified at all times mentioned in the pleadings in this cause.

That the said contract and agreement for the construction of said building, which was the Eola Hotel Building in Natchez, Mississippi being Project No. 640 above mentioned, had as a part thereof certain specifications compiled by Weiss, Dreyfus & Seiferth, Inc., Architects, and referred to in said contract and made a part thereof; and that the copy of said specifications filed with the original bill of complaint herein and marked exhibit "B" thereto, is correct. That on the 20th day of October, 1926, the said J. V. & R. T. Burkes in compliance with the said contract and specifications, furnished the Bond mentioned in the original bill of complaint as shown by the copy thereof filed as Exhibit "C" to said original bill of complaint and that said copy so filed as said exhibit is correct; and that the Hartford Accident and Indemnity Company was the surety on said Bond and on said date executed the same as surety.

That thereafter the said J. V. & R. T. Burkes, contractors, proceeded to construct the said Eola Hotel Building under said contract and specifications and that said building was accepted by the Natchez Investment Company, Inc., on or about the 10th day of August, 1927. That the said Natchez Investment Company was the owner of the property upon which said Hotel Building was erected and was and is the owner of the erected Eola Hotel Building.

[fol. 57] That the St. Bernard Cypress Company, Ltd., at the special instance and request of the defendants,

J. V. & R. T. Burkes, furnished and delivered unto the said J. V. & R. T. Burkes, certain quantities of building materials, lumber, for use in the construction and erection of the said Eola Hotel Building under said Project No. 640; that said materials, lumber, were purchased by the said J. V. & R. T. Burkes, as contracted, for use in the construction of the said Eola Hotel Building and that same were purchased and sold to said J. V. & R. T. Burkes on January 20th, 1927, at and for the total price and sum of Two Hundred Eighty-four Dollars ($284.00) all of which is shown by the sworn itemized statement of said account attached to the answer and cross bill of complaint of said St. Bernard Cypress Company, Ltd. and made a part thereof and marked Exhibit "A" thereto, and that said sworn itemized statement of account is correct; that there remains due and owing unto said St. Bernard Cypress Company, Ltd., by the said J. V. & R. T. Burkes, for said materials, lumber, furnished as aforesaid, the principal sum of Two Hundred Eighty-four Dollars (284.00) with interest thereon at the rate of 6% per annum from February 20th, 1927, and that all of the lumber alleged by said St. Bernard Cypress Company, Ltd., in its cross bill to have been so sold was used by said J. V. & R. T. Burkes in the erection and construction of the Eola Hotel Building under said Project No. 640; and that said lumber is now incorporated in the said Eola Hotel Building and that the costs and prices charged for the same and the entire amount sued on is just, fair and reasonable, and at a price and sum agreed to by the said J. V. & R. T. Burkes and the said St. Bernard Cypress Company, Ltd., and that said amount with interest as aforesaid is due, owing and unpaid by the said J. V. & R. T. Burkes for said lumber.

That on the 24th day of October, 1927, the St. Bernard [fol. 58] Cypress Company, Ltd., gave notice to the said Natchez Investment Company, Inc., the owner of the Eola Hotel Building, and property on which the same is situated in strict conformity with Chapter 128 of the Laws of the State of Mississippi of 1918, that it had furnished said materials, lumber and that the amount due therefor was unpaid; and that the said St. Bernard Cypress Company, Ltd., fully complied with the provisions of Chapter 128 of the Laws of the State of Mississippi of 1918 for the giving of notice to the owner of the amount owing for material used in the construction of said Hotel Building.

That the said J. V. & R. T. Burkes have defaulted in the payment of the aforementioned sum to the said St. Bernard Cypress Company, Ltd., and that demand has been made upon them to pay said amount which they have failed and refused to do.

That it should be finally held in this cause, by the Court, that the Bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as surety thereon, on the terms and conditions as shown by the pleadings in this cause, was and is a Bond guaranteeing the faithful performance on the part of the said J. V. & R. T. Burkes, Contractors, of their contract for the construction of said Eola Hotel Building under said Project No. 640, as alleged in the pleadings in this cause, and that same is still in force, then the said St. Bernard Cypress Company, Ltd., is entitled to a judgment against the Hartford Accident & Indemnity Company for the full amount herein sued for and demanded, as hereinabove agreed and as alleged in the cross bill of complaint filed by said St. Bernard Cypress Company, Ltd.; but the Hartford Accident & Indemnity Company does not agree that they are liable for interest on said amount but the question of liability for interest is left to the decision of the Court, as a matter of legal construction under the contract, docu-
[fol. 59] ments and Bond. That no attorneys fees were demanded by said St. Bernard Cypress Company, Ltd., in any of the pleadings filed by it in this cause.

Nothing herein contained shall in anywise be taken as an agreement by the Hartford Accident & Indemnity Company that this is a concursus proceeding or a proceeding in anywise akin thereto, or that it was made necessary by the Hartford Accident & Indemnity Company, or that the Bond herein given by it was a Bond guaranteeing the faithful performance of the contract, or that the Bond is still in force; but such matters are left to the Court for determination as a matter of legal construction on the proof, pleadings, contract documents, exhibits, Bond and law.

This the — day of ——, A. D. 1929.

St. Bernard Cypress Company, Ltd., by W. A. Geisenberger, Atty. Hartford Accident & Indemnity Company, by L. Barrett Jones, Atty.

[File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

27293

HARTFORD ACCIDENT & INDEMNITY CO.

vs.

NATCHEZ INVESTMENT CO.

OPINION—Filed Dec. 3, 1928.

ETHRIDGE, J.:

This is an appeal from a decree of the Chancery Court of Adams County overruling appellant's demurrer to the original bill of the Natchez Investment Co., Inc., and to answers and cross bills filed by the intervenors in the suit.

The Natchez Investment Co., Inc., filed its bill against the Hartford Accident & Indemnity Co., upon a contract of indemnity for the performance of a contract for the construction of a hotel building for the Natchez Investment Co., Inc., by J. V. and R. T. Burkes, a co-partnership doing business in New Orleans, La. The bill set out the making of a contract between J. V. and R. T. Burkes and the Natchez Investment Company, making the plans and specifications for the building, the contract between J. V. and R. T. Burkes and the Natchez Investment Co., Inc., and also the bond given by the Hartford Accident & Indemnity Co. exhibits to the bill.

It is alleged that under date of October 18th, 1926, the Natchez Investment Co., Inc., entered into a certain agreement or contract with J. V. and R. T. Burkes, for the construction of a certain building in Natchez, known as Project No. 640 on the files of Weiss, Dreyfus, Inc., Architects at New Orleans, La.; that said contract or agreement had as a part thereof certain specifications compiled by the [fol. 61] architects and referred to said contract and made a part thereof (copy of which specifications were made a part of the bill); that the said specifications contained 126 numbered pages, and also three pages preceding these numbered ones, all bound in a binder, and marked "Plans No. 640. Specifications for the Eola Hotel, a seven story fire proof building to be erected at Natchez, Miss." It is alleged

that in the said specifications appears the following language:

"Article 30. It shall be the obligation of every contractor and subcontractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner or Architects; contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee.—It is the intent of the architect to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and [fol. 62] must rectify all defects discovered in his work within one year after the completion of the entire structure and its acceptance by the architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of the contract; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

"Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the owner and the architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the architect reserve the right to make such changes, alterations, and

additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

"The sureties for the various contractors shall be, and are hereby declared and acknowledged themselves to be, bound to the owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

The bond given and made Exhibit "C" to the declaration, contained the following language:

[fol. 63] "Whereas, the principal and the obligee have entered into a certain written contract (hereinafter called the contract,) dated October 18th, 1926, to construct Eola Hotel building as per plans and specifications #640, prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof,

"Now, therefore, the condition of this obligation is such that if the Principal shall idemnify the Obligee against loss or damage directly caused by the failure of the Principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the Surety, upon the following conditions, which shall be precedent to the right of recovery hereunder.

"1. The Obligee shall, at the time and in the manner specified in the contract, fully comply with all the terms thereof, and if the obligee default in the performance of this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

"2. If the Principal shall in any manner default in the performance of any manner or thing specified in the contract, the Obligee shall immediately so notify the Surety and thereafter the surety shall have the right at its option to assume, or assume and sublet the contract, and to proceed thereunder as if no default or abandonment had occurred, and in such event all moneys agreed in the contract to be paid the Principal and which at the time of de- [fol. 64] fault or abandonment are unpaid by the Obligee shall thereupon belong and become payable to the Surety and shall be paid to it.

"3. If at any time there come to the notice or knowledge of the Obligee information that any claim for labor performed or for materials furnished the Principal in or upon the work specified in the contract remains unpaid, or that any lien or notiec of lien for such work or materials has been filed or served, the Obligee shall withhold from the Principal payment of any moneys due to or to become due to the Principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the Surety giving a statement of the particular facts and amount of each such claim, lien or notice of lien.

"4. If any changes or alterations by the Principal or Obligee shall be made in the plans or specifications for the work described in the contract, the Obligee shall immediately notify the Surety thereof, giving a description and stating the amount of money involved by such changes or alterations. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10 per cent of the penal sum of this bond, no further changes or alterations shall be made by the principal or obligee until the consent of the Surety shall first be obtained thereto. * * *

"6. This bond does not apply to nor cover guarantees of the work specified in the contract; nor of its efficiency; nor of the wearing qualities thereof; not for maintenance of or repairs thereto unless hereinafter specifically agreed [fol. 65] to as being covered by this bond; nor for the furnishing of any bond: nor to the payment of any damages or compensation either at common law or under any statute, Federal or State, arising from or growing out of injuries to persons or property; nor for failure to procure insurance or to comply with any statute covering such damages or compensation; nor the furnishing of any policy of insurance: nor for damages caused by delay in completing the work except such damages as have actually been sustained and proved."

The bill further alleged that "the said J. V. & R. T. Burkes proceeded to construct the said Eola Hotel under the said contract and specifications, and the Natchez Investment Co., Inc., accepted the said hotel under an agree-

ment dated August 10th, 1927, by which the said J. V. and R. T. Burkes agreed that, notwithstanding the acceptance of the said hotel by complainant, that should the Architects later determine that any work done in connection with the hotel had been faulty or improperly done or neglected, that then the said contractors, J. V. and R. T. Burkes, would be held and bound to construct, correct and supply such work, labor and material as might be determined by the Architects to be furnished, constructed, corrected or supplied on said hotel job, and a copy of said contract, is filed herewith, marked Exhibit "D", and made a part hereof for all purposes; that payments were made to the said contractors for all sums owing under same as agreed between the said contractors and complaintnat, except for the sum of $4,122.00, which amount is in the hands of the Canal Bank & Trust Co. of New Orleans, La., Trustee for the disbursement of the building fund that had been provided by a first mortgage bond issue for the building of said hotel; that before the disbursement of said $4,122.00 to the said J. V. [fol. 66] and R. T. Burkes, your complainant received written notices from various persons who had supplied materials to the said contractors in the building to the Eola Hotel, stating that they had not been paid for the material furnished, and complainant here offers to have said Trustee pay said amount into court," and the names of the parties furnishing complainant with lists of materials furnished contractors, for which payment had not been made, were set out in the bill. The amount of the said claims aggregated the sum of about $62,073.29. The bill further alleged that, "Thereupon the said $4,122.00, balance owing the said J. V. and R. T. Burkes out of the construction fund, was not paid over, but still remains in the hands of the trustee; that complainant also received notice that New Orleans Bank & Trust Co. had been assigned by J. V. and R. T. Burkes part of the claim of J. V. & R. T. Burkes against complainant in connection with the construction of the said hotel in the amount of $26,323.00, and the said J. V. & R. T. Burkes and the New Orleans Bank & Trust Co. have brought suit in the Circuit Court of Adams County, Miss., No. 1305 on the docket of the Circuit Court of Adams County, Miss., claiming the said balance to be owing on the building of the Eola Hotel, and that said balance has been assigned to New Orleans Bank & Trust Co., and complain-

ant denies owing said balance on said contract; that under the agreement, Exhibit "D" hereto, the said contractors are liable to correct improper work and faulty work done in connection with the said Eola Hotel to an amount estimated to be the value of $6,000.00; that, among the parties above mentioned as having given notice to complainants of claims against said contractors which have not been paid, is O. L. Bunn, doing business as Bunn Electric Co., who has brought suit in the Circuit Court of Adams County, Miss., "against the said contractors and the complainant for amounts owing by said contractors, J. V. and R. T. Burkes, and unpaid by them.

[fol. 67] The bill further alleges, "That the Hartford Accident & Indemnity Co., one of the defendants herein, has been notified that under its bond it is liable for all sums owing by the said contractors, J. V. and R. T. Burkes, in connection with the building of the Eola Hotel, and has denied its liability on its said bond, claiming that its said bond is not a bond that guarantees the faithful performance of the contract, but is a bond of indemnity; that Section 2, Chapter 128 of the Laws of 1918 for the State of Mississippi (Hemingway's Code of 1927, Sec. 2597), denies to any contractor the right to assign, transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of sub-contractors, journeymen, laborers and material men as declared in said Act and provides that all such assignments, transfers or dispositions shall be subordinate to the rights of sub-contractors, journeymen, laborers and material men as well as the owner; that should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project #640, then in such case any assignment made by the said J. V. and R. T. Burkes to New Orleans Bank & Trust Co. of the proceeds of said contract would be subordinate to the rights and claims of the sub-contractors and material men mentioned herein, and to whom the said J. V. and R. T. Burkes owe money for material furnished in the construction of the Eola Hotel; that under said contract, specifications and bond, and under the law, your complainant is entitled to bring suit against said contractors and said surety on said bond and to bring in all sub-contractors and material men having claims for material furnished in the building of said

Eola Hotel, and for which material they have not been paid by the said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifications is a bond for the faithful performance of said contract, or simply a bond of indemnity."

[fol. 68] It is further alleged that the complainant, by reason of the facts set forth, had incurred attorneys' fees in connection with the suit, and prayed for an allowance of attorneys' fees under the contract; that complainant "is entitled to have and recover under said bond the amount and value of work necessary to be done and labor and material necessary to be furnished by said contractors to complete and maintain the said Project #640 according to plans and specifications and which complainant avwrs is the sum of $15,000.00; that the parties herein named as furnishing material in connection with said project #640 to said contractors have not been paid and are entitled to recover the amounts owing to them by said contractors and to have judgment for said amounts on said bond.

ETHRIDGE, P. J., after stating the above facts, delivered the opinion of the Court:

Section 1 of Chapter 128, Laws of 1918, (Hemingway's 1927 Code, Section 2597) amends Section 3074, Code of 1906, giving to sub-contractors, laborers, etc., the right to bind the amount due the contractor by written notice provided for in said section, and, when such notice is given, the funds then due by the builder to the contractor are impounded in favor of such material-men, sub-contractors, laborers, etc. By Section 2 of Chapter 128, Laws of 1918, (Hemingway's 1927 Code, Section 2597) it is provided that "No contractor or master workman, except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of, in any, the contract or the proceeds thereof, to the detriment or prejudice of the sub-contractors, journeymen, laborers and materialmen, as declared hereinbefore, and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the sub-[fol. 69] contractors, journeymen, laborers and materialmen, as well as the owner. Provided, however, that this section shall not apply to any contract or agreement where the contractor, or the master workman shall enter into a

solvent bond conditioned as provided for in Section 3 hereof."

It will be seen from a study of these two sections that the legislature has provided a lien upon funds due the contractor by the builder in favor of laborers, journeymen, sub-contractors and materialmen. When the conditions of the statute are complied with, the builder is obliged to hold, for the purpose — paying or satisfying these claims, at least, to the extent that such funds due the contractor by him will pay them; and if such funds are insufficient to pay them in full, they shall be prorated. In practically all of the States, such liens are in force, and are upheld as valid regulations of contract rights by the Legislature. A giving of liens in favor of those who have performed labor or furnished material which is used in a building where the builder has not, prior to such notice, paid out the contract price, are universally upheld. Such sections are in furtherance of a wise public policy, designed to protect people whose labor and material have been furnished to the contractor for use in the building constructed by him for a third person.

As we understand this, Section 1 is in no wise challenged as being within the competence of the Legislature to enact, but Section 2 of the Act is challenged as impairing the right of a contractor to make contracts and to receive the price therefor, and dispose of it, as he sees proper, as a necessary incident to the protection of his business. Of course, the section does not prohibit the sub-contractors, journeymen, laborers and materialmen from waiving such right or entering into contracts by which such rights are waived or otherwise provided for, but it does give rights to the sub-contractors, journeymen and laborers and materialmen against the funds due the principal contractor for the pro- [fol. 70] tection of their contracts with him, and in furnishing labor and material in carrying out his contract. The Legislature has the power to regulate the right of contract in a reasonable manner, so long as the right to contract is not destroyed or seriously impaired. The effect of the statute before us in the case named is similar to impounding money due to one person by a process of garnishment to the satisfaction of the claims of another person against the owner of such funds, and it has always been, as we understand it, permissible for the Legislature to pro-

vide remedies to parties furnishing labor and material, or in selling property, by providing liens or other proceedings impounding the property, or its proceeds.

The contractor making a contract with sub-contractors, journeymen, laborers, materialmen has no constitutional rights to be free from the obligation of paying them, nor has he the right to claim the proceeds derived from the builder under his contract, free from the claim of the laborers, sub-contractors, journeymen and materialmen with whom he has contracted, and whose material or labor he has secured in the performance of his own contract. We see no difference in principle in providing the security given by Section 2 to such sub-contractors, journeymen, laborer*w* and materialmen from that given by law in Section 1 of the statute. We recognize the difference in the power of the Legislature to deal with contracts made by public bodies, such as the state, county, or municipality, or other agencies of the public, and the right to regulate contracts made between private individuals. In case of public bodies and public corporations, being agencies of the state; acting for its purposes and having such powers only as the State confers upon them, the State has, in the absence of constitutional restr*u*ction, a plenary right to prescribe the terms and conditions of public contracts, or contracts of public boards, or municipalities, and parties dealing with such [fol. 71] powers or agencies of the State, deal with them in the light of the law giving them power and imposing restrictions upon their right of contract. But, in the case of individuals, the Legislature had no such plenary right. The citizen has the liberty of contracting, which cannot be entirely destroyed by the State, except in given circumstances deemed necessary for the protection of the public. In the case of private contracts, the Legislature can only impose reasonable regulations and restrictions, etc., and cannot entirely take away the right, nor deny it to such an extent as to substantially destroy the right. However, its power to regulate contracts and provide conditions under which they can be made and enforced is quite large, and it is a delicate question to draw any precise limitation upon such right. We do not think Section 3 of Chapter 128 of the Laws of 1918 goes beyond the constitutional limit in this record. This section does not prohibit parties from making reasonable contracts, it does not require the bond

therein provided for to be executed by the parties, nor does it prohibit them from taking other kinds of bonds or contracts of a reasonable nature in conducting their business of contracting. The section provides that:

"When any contractor or sub-contractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or sub-contractor shall promptly make payments to all persons furnishing labor — material under said contract," etc.

This bond comes into operation when the parties enter into the kind of contract and the kind of bond provided [fol. 72] for in the section, and does not intend to prevent the parties from making other and different contracts and bonds; but, if a bond is not given, as provided for in Section 3 of the statute, then Section 1 and 2 continue in force for the benefit of the materialmen, sub-contractors, journeymen and laborers, and they have the full right to protect their interests in accordance with the terms of these sections. If the parties desire to be freed from the operation of sections one and two, they may execute the bond provided for in Section three, and, when that is done the contractor and owner, or builder, are freed from the provisions of Sections one and two, and the bond given stands in lieu or instead of the securities provided for in such sections and operates for the benefit, not only of the contractor and the builder, but for such other persons as well.

Does the bond given in the present case come within the provisions of Section 3. In other words, is it such a bond as is provided for therein?

In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear that the parties intended to execute the bond provided for and required by the contract between the owner and contractor, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a

bond as was called for by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor, and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond [fol. 73] in conformity with Section 3 of the Act above quoted.

This brings the case within the decision rendered in the case of U. S. F. & G. Co. v. Parsons, et al 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the sub-contractors, journeymen, laborers and materialmen.

We do not think the cases relied on construing Chapter 217, Laws of 1918, which provides for the bonds and the securities of people who furnish labor and material for public works have any controlling force in the present case. As stated above, no constitutional question arises as to the power of the legislature to dictate the terms and conditions of public contracts, and the necessary conditions and requirements deemed by the Legislature to be proper in such cases.

The judgment of the court below will be affirmed, and the cases remanded for further proceedings in accordance with this opinion.

Affirmed and remanded.

[File endorsement omitted.]

[fol. 74] IN SUPREME COURT OF MISSISSIPPI,
DIVISION B

27293

THE HARTFORD ACCIDENT & INDEMNITY CO.

vs.

THE NATCHEZ INVESTMENT COMPANY ET AL.

JUDGMENT ON THE APPEAL FROM THE CHANCELLOR'S DECREE OVERRULING THE DEMURRER—Dec. 3, 1928

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Adams County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, and adjudge and decree that the decree of said Chancery Court rendered in this cause on January 27th, 1928, be and the same is hereby affirmed and this cause is hereby remanded to the court below for further proceedings in accordance with the opinion this day rendered. It is further ordered, adjudged and decreed that the appellant and Mississippi Fire Insurance Company, surety in the appeal bond, do pay the costs of this appeal, to be taxed, etc.

[fol. 75] IN CHANCERY COURT OF ADAMS COUNTY

c. # 5323; B., # 176

NATCHEZ INVESTMENT COMPANY, INC., Complainant,

vs.

J. V. & R. T. BURKES, T. J. BARTLETT, Trustee in Bankruptcy for J. V. & R. T. Burkes; Hartford Accident & Indemnity Company, et als., Defendants

DECREE—Filed Jan. 10, 1930

This cause coming on for hearing on the Bill of Complaint filed herein and all pleadings filed herein and on oral testimony and depositions and Agreed Statements

of Fact as filed herein, and the Defendants, J. V. & R. T. Burkes and T. J. Bartlette, Trustee in Bankruptcy for Burkes, as principal, and Hartford Accident & Indemnity Company having appeared herein and filed Answers and being before the Court, and the Court having listened attentively to the evidence, to the Depositions introduced and to the Agreed Statement of Fact filed herein, and having heretofore during the regular July Term 1929 of Chancery Court of Adams County, Mississippi, by agree-[fol. 76] ment of all parties entered a Decree herein under date of August 1st, 1929, enrolled in Minute Book I, page 363 of the Chancery Minutes of said Court, set said cause for final hearing and decree in vacation the same as in term time, and the Court being now ready to find a Decree in said cause and being fully advised in the premises, doth Order, Adjudge and Decree:

That the Bond herein sued on, executed by J. V. & R. T. Burkes, as principal, and Hartford Accident & Indemnity Company of Hartford, Connecticut, as surety, by virtue of the Contract Documents and under the Law of the State of Mississippi, is a Bond guaranteeing the faithful performance of the Contract for the execution and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640 on the Files of Weiss, Dreyfus & Seiferth, Inc., Architects, of New Orleans, Louisiana, and that said Bond now and at all times mentioned herein was and is still in full force and effect, and that the surety on said bond, Hartford Accident & Indemnity Company of Hartford, Connecticut, is by this Court decreed to be liable on said Bond for the payment of the respective sums hereinafter set forth and decreed to be due and owing to the respective creditors, or claimants, hereinafter set forth, and that said F. V. & R. T. Burkes, as principal, and Hartford Accident & Indemnity Company, jointly and severally, liable in said respective sums to said respective claimants.

It is further Ordered, Adjudged, and Decreed that the said Hartford Accident & Indemnity Company and said J. V. Burkes and R. T. Burkes are jointly and severally [fol. 77] liable to said claimants for interest on the amounts respectively due to each in the sums and amounts set forth hereinafter as for amounts of interest, and that such respective interest items have been calculated to the date

of this Decree, and that said principal sums of indebtedness likewise bear interest from and after said date of this Decree at six (6%) per cent per annum.

It is further Ordered, Adjudged and Decreed that there is to be paid for and in behalf of Engle & Laub to the said Complainant, Natchez Investment Company, Inc., the sum of Five Thousand and no/100 ($5,000.00) Dollars, and to I. Levy, Receiver for said Natchez Investment Company, Inc., and/or T. S. Sholars, Trustee in Bankruptcy for Natchez Investment Company, Inc., the said Angle & Laub being the Attorneys of record who rendered services herein for and in behalf of said Natchez Investment Company, Inc., in bringing the original proceedings herein; and said proceedings being concursus proceedings, or in the nature of concursus proceedings, and under the Bond given in this cause and under the facts said Complainant is entitled to recover its attorneys' fees for the bringing of such proceedings, said proceedings having been brought within six months from the date of the completion of Project No. 640 hereinabove set forth, and the bringing of such proceedings becoming necessary under the facts in this case,—and such amount of Five Thousand Dollars, as aforesaid, is hereinafter adjudged and allowed.

[fol. 78] And it is thereupon further Ordered, Adjudged, and Decreed that said Intervenors and the Cross-Complainants herein do have and recover, of, from, and against said J. V. Burkes and said R. T. Burkes and Hartford Accident & Indemnity Company, of Hartford, Connecticut, jointly and severally, Judgment for principal, and interest, as hereinafter set forth, to-wit:

O. L. Bunn, doing business as Bunn Electric Company:	
Principal	$4,197.87
Interest	596.10
Total of Judgment here rendered	$4,793.97
The Coburn Trolley Track Mfg. Co.:	
Principal	$2,905.91
Interest	436.85
Total of Judgment here rendered	$3,342.76

Gibbens & Gordon, Inc.:	
Principal	$3,219.77
Interest	353.49
Total of Judgment here rendered	$3,755.26
Hockaday, Inc.:	
Principal	$2,611.15
Interest	426.24
Total of Judgment here rendered	$3,037.39
The R. C. Lieb Company:	
Principal	$1,197.45
Interest	166.67
Total of Judgment here rendered	$1,364.12
Natchez Drug Company:	
Principal	$125.62
Interest	18.21
Total of Judgment here rendered	$143.83
National Show Case Company:	
Principal	$417.45
Interest	61.74
Total of Judgment here rendered	$479.19
Schwartz & Stewart:	
Principal	$149.19
Interest	21.63
Total of Judgment here rendered	$170.82
[fol. 79] Walter C. Schultz, doing business as Schultz Cabinet Works:	
Principal	$399.40
Interest	59.94
Total of Judgment here rendered	$459.34
Southern Cement Company:	
Principal	$1,729.28
Interest	290.78
Total of Judgment here rendered	$2,020.06

Tuscon Steel Company:	
Principal	$3,458.65
Interest	762.04
Total of Judgment here rendered	$4,220.69
White Stone Company, Inc.:	
Principal	$503.52
Interest	75.54
Total of Judgment here rendered	$579.06
Woodward, Wight & Company, Ltd.:	
Principal	$1,579.69
Interest	267.12
Total of Judgment here rendered	$1,846.81
R. Lee Parker, Jr.:	
Principal	$1,936.10
Interest	299.68
Total of Judgment here rendered	$2,233.78
R. Scudamore, Jr.:	
Principal	$1,398.43
Interest	215.00
Total of Judgment here rendered	$1,613.43
R. Lee Parker, Jr., and R. Hicks Parker, Co-partners doing business as Natchez Brick Company:	
Principal	$3,958.50
Interest	562.79
Total of Judgment here rendered	$4,521.29
Walter Williamson and A. A. Greern co-partners doing business as Williamson-Greer Co. of Dallas, Texas:	
Principal	$12,815.10
Interest	2,018.32
Total of Judgment here rendered	$14,833.42

G. R. Burkett, doing business as Burkett Sheet Metal Works:	
Principal	$2,612.99
Interest	426.56
Total of Judgment here rendered	$3,039.55
[fol. 80] W. A. Jacobie:	
Principal	$4,017.72
Interest	519.82
Total of Judgment here rendered	$4,537.54
St. Bernard Cypress Co.:	
Principal	$284.00
Interest	48.80
Total of Judgment here rendered	$332.80
Geisenberger Bros. Drug Co.:	
Principal	$78.09
Interest	10.65
Total of Judgmenr here rendered	$88.74
M. P. Phelan:	
Principal	$98.81
Interest	14.69
Total of Judgment here rendered	$113.50
Enochs Lumber & Mfg. Co.:	
Principal	$8,717.63
Interest	1,285.75
Total of Judgment here rendered	$10,003.38
Southern G. F. Co.:	
Principal	$3,148.00
Interest	524.17
Total of Judgment here rendered	$3,672.17
Feltus Bros. Hardware Co.:	
Principal	$380.87
Interest	56.10
Total of Judgment here rendered	$436.97

Chamberlain Metal Weather Strip Co.:	
Principal	$410.00
Interest	60.47
Total of Judgment here rendered	$470.47
Ingalls Iron Works:	
Principal	$562.10
Interest	76.48
Total of Judgment here rendered	$638.58
Capitol Paint & Glass Co.:	
Principal	$517.33
Interest	76.25
Total of Judgment here rendered	$593.38
Mosler Safe & Lock Company:	
Principal	$218.14
Interest	33.79
Total of Judgment here rendered	$251.93

[fol. 81] Natchez Investment Company, Inc., and/or I. Levy, Receiver for Natchez Investment Company, Inc., and/or T. S. Sholars, Trustee in Bankruptcy for Natchez Investment Company, Inc., the sum of $5,000.00

as Attorneys' fees for services rendered by Engle & Laub, Attorneys in this cause, to be paid to them.

It is further Ordered, Adjudged, and Decreed that the total of said judgments hereinabove awarded and rendered shall bear interest at the rate of six (6%) per cent. per annum from this date until paid and that all costs accrued in this cause to be taxed to be paid by said J. V. Burkes and R. T. Burkes and Hartford Accident & Indemnity Company, jointly and severally, for all of which let execution issue.

It appearing to the Court that several of the materialmen, sub-contractors, and laborers who have intervened and filed cross-bills of Complaint in this cause have claimed an allowance of attorneys' fees for the services of attorneys employed by them in the prosecution of their claims in this cause, said claimants demanding such allowance of attorneys' fees upon the provisions of the contract documents and bond to the effect that the Bond shall pro-

vide for the payment of reasonable attorneys' fees incurred in the enforcement of the contract, and such claimants for attorneys' fees contending that their proceedings for the enforcement of the payment of their claims were proceedings brought for the enforcement of the contract, the faithful performance of which was guaranteed under and by virtue of the terms of the contract documents and bond,—and it appearing to the Court from the evidence in this cause that were such attorneys' fees allowable to these claimants demanding the same that an allowance of fifteen (15%) per cent. of the principal and interest herein al- [fol. 82] lowed to each would be and is a just, fair, and reasonable sum for allowance as attorneys' fees; and were the Court of the opinion that such attorneys' fees were allowable to said respective claimants in this cause, the Court would render Judgment here for each respectively on account of attorneys' fees, in addition to the principal and interest allowed by way of judgment to them, as follows, to wit:

O. L. Bunn, doing business as Bunn Electric Company	$719.10
Coburn Trolley Track Mfg. Co.	501.41
Gibbens & Gordon, Inc.	563.29
Hockaday, Inc	455.61
The R. C. Lieb Company	204.62
Natchez Drug Company	21.58
National Show Case Company	71.87
Schwartz & Stewart	25.62
Walter C. Schultz, doing business as Schultz Cabinet Works	68.90
Southern Cement Company	303.00
Truscon Steel Company	633.10
White Stone Company, Inc.	86.86
Woodward, Wight & Company, Ltd.	277.02
R. Lee Parker, Jr.	335.36
R. Scudamore, Jr.	242.01
R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company	678.19
Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co., of Dallas, Texas	2,225.01
Mosler Safe & Lock Company	37.79

[fol. 83] and the Court does hereby adjudicate said amounts as being just, fair, and reawonable as an allowance for attorneys' fees to said several claimants respectively should it be considered by the Court that such claimants under the contract documents and bond were entitled to recover attorneys' fees in this cause; however, in the opinion of the Court, after considering the terms of the contract documents and the bond, though the proceedings brought by the several intervenors and cross-complainants were proceedings brought for the enforcement of the contract, in that such proceedings were brought to enforce the provisions of the contract requiring the principal Contractor to pay to all sub-contractors, materialmen, and laborers the amounts accrued to them for material and labor furnished and used in and about the erection, construction, and finishing of the Eola Hotel; yet, in the opinion of the Court, under the provisions of said contract documents and bond attorneys' fees are allowable only to the principal obligee under the Bond, being the owner of the property.

And it further appearing unto the Court that N. O. Nelson Manufacturing Company as Assignee of A. W. Moore, doing business as Acme Engineering Company, obtained leave of the Court to intervene in this cause as a Defendant and Cross-Complainant as of right by Decree rendered by the undersigned Chancellor on the 14th day of August, 1929, duly enrolled in the Minutes of this Court, and that said N. O. Nelson Manufacturing Company as Assignee of A. W. Moore, doing business as Acme Engineering Company, thereafter pursuant to said permission ontervened herein and did file its Answer and Cross-Bill of Complaint [fol. 84] seeking to recover against said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company the principal sum of Five Thousand Nine Hundred and Seventeen and 53/100 ($5,917.53) Dollars and interest and attorneys' fees on said sum for labor and materials furnished in and about the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640; and it further appearing that thereafter Hartford Accident & Indemnity Company filed a Motion in this cause moving the Court to strike from the files the said Intervention and Cross-Bill of Complaint of

said N. O. Nelson Manufacturing Company; and it further appearing that the issues as to said claim and intervention of said N. O. Nelson Manufacturing Company have not yet been heard or tried by this Court, it is thereupon further Ordered, Adjudged, and Decreed that said issue as to the intervention and claim of said N. O. Nelson Manufacturing Company be continued to be heard and determined at the regular January Term, 1930 of the Chancery Court of Adams County, Mississippi, it being the intention by this Order to reserve unto all parties concerned in said claim and intervention all rights and remedies they would have had not this Decree been entered and rendered at this time.

It is further Ordered, Adjudged, and Decreed that all issues involved in this cause not determined heretofore or by this Decree be and the same are hereby continued for hearing and determination at the January Term 1930 of the Chancery Court of Adams County, Mississippi.

[fol. 85] It is further Ordered, Adjudged, and Decreed as to the suit of J. V. and R. T. Burkes and New Orleans Bank & Trust Company brought in the Circuit Court of Adams County, to establish a mechanics' lien on the Eola Hotel and transferred to this Court and in which a motion to dismiss because prematurely brought was filed in Circuit Court, Adams County, and heard by this Court in this cause the Court will Reserve its ruling at this time because all Briefs in this issue have not been filed with the Court, the Court Reserving the right to render its Decree as to the issue involved as aforesaid at any time hereafter in term time or vacation.

The Hartford Accident & Indemnity Co. excepts to this decree. Any parties to the litigation interested in this Decree may have their appeal as provided by law.

Ordered, adjudged, and decreed in vacation, at Magnolia, Pike County, Mississippi, on this the 6 day of January, A. D., 1931.

R. W. Cutrer, Chancellor.

[File endorsement omitted.]

[fol. 86] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

NATCHEZ INVESTMENT COMPANY, INC., ET AL.

OPINION—Filed Feb. 23, 1931

ETHRIDGE, P. J.:

This is the second appeal of this cause, the decision in the first appeal being reported in 155 Miss. 31, 119 So. 366, on which appeal a statement of the case as it had then developed was made. The constitutionality of Chapter 128, Laws of 1918 was upheld, and the contract between the Hartford Accident and Indemnity Company and the Natchez Investment Company, Inc. was construed and the bond held to be a bond in accordance with the provisions of Section 3, Chapter 128, Laws of 1918.

On a remand of the cause to the court below the various materialmen who had furnished material for the building, and others who had advanced money to the Natchez Investment Company, or to the contractor upon a note given by that company, propounded claims against the appellant, Hartford Accident and Indemnity Company, setting forth their claims and praying judgment for the amount thereof against the Hartford Accident and Indemnity Company and contractors, and also for interest upon the said claims and for attorneys' fees incurred in propounding and litigating their claims. A cross bill was filed against Hartford Accident & Indemnity Company and the contractors, the suit having been filed as a concursus proceeding by the Natchez Investment Company, Inc., for the benefit of all such persons, and such persons being made defendants to that bill.

Among the provisions of the contract between the contractors and the Natchez Investment Company, Inc., for the building of the hotel, was a provision stating that the owners should make payments on account of the contract, [fol. 87] as provided therein, on or about the 1st and 15th day of each month the value, based on the contract price,

of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 1st and 15th day of each month, as estimated by the Architects, less the aggregate of previous payments. It was also provided in the contract that the contractor should furnish and pay for all materials and labor used in the construction of the building.

On the hearing in the court below agreed statements of facts were entered into between the Hartford Accident & Indemnity Company and the several materialmen whose claims were propounded in the said proceeding. These agreements are practically and substantially alike and, in effect, agree that on the 18th day of October, 1926, the Natchez Investment Company, Inc., entered into contract with J. V. and R. T. Burkes of New Orleans, Louisiana, for the construction of a hotel according to plans and specifications known as Project No. 640 of Weiss, Dreyfus and Seiferth, Inc., and that the Burkes entered upon the construction of the hotel. That the materials claimed by the several claimants were actually furnished to the Burkes, the contractors, and that the amount of them was correct, and that the prices were fair and reasonable, and the balance due, shown in the claim, was unpaid by J. V. & R. T. Burkes, and that they went into the hotel building. The agreements reserved the question as to whether an attorney's fee was due and payable to the claimants, and also whether interest was due and payable; also agreed that demand had been made upon the Natchez Investment Company for the payment of the said sums of money.

The bond of the appellant contained, among other things the following clauses:

"1. The Obligee shall, at the times and in the manner specified in the contract, fully comply with all the terms [fol. 88] thereof, and if the obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

"3. If at any time there come to the notice or knowledge of the obligee information that any claim for labor performed or for materials furnished the principal in or upon the work specified in the contract remains unpaid, or that any lien or notice of lien for such work or materials has

been filed or served, the obligee shall withhold from the principal payment of any money due or to become due to the principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the surety, giving a statement of the particular facts and amount of each such claim lien or notice of lien.

"4. If any changes or alterations by the principal or obligee shall be made in the plans or specifications for the work described in the contract, the obligee shall immediately notify the surety thereof, giving a description and stating the amount of money involved by such changes or alterations. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10% of the penal sum of this bond, no further changes or alterations shall be made by the principal or obligee until the consent of the surety shall first be obtained thereto.

"8. None of the conditions or provisions contained in this bond shall be deemed waived or altered by the surety unless the written consent to such waiver or alteration be duly executed by its authorized officers and its seal be duly affixed thereto; nor shall the obligee consent to an assignment of the contract or any part thereof without the express consent of the surety duly executed and attested as aforesaid; nor shall this bond or any rights thereunder be assignable except with the consent of the surety duly executed and attested as aforesaid." It was also provided [fol. 89] in paragraph 7 of the bond that the surety shall not be liable unless the contract was paid in cash; and, under paragraph 11, the obligation of the surety should be construed strictly as one of suretyship only, and should not be for the benefit of any person other than the named obligee.

The contract between J. V. & R. T. Burkes, the principal in the bond, and the Natchez Investment Company, Inc. was for the price of $316,822.00, exclusive of extras, and provided that payment was to be made in current funds. The Natchez Investment Company, Inc., floated a bond issue with which to erect the building, but the proceeds thereof had to be supplemented by individual funds of the company. The bond issue netted about $280,000.00. After

the work started, and the contractors became entitled to their first estimate, instead of being paid in cash or in current funds, the contractors were given notes aggregating $38,000.00. These notes were assigned to banks and money procured from the banks by J. V. & R. T. Burkes, and the funds so obtained were used in paying for labor and material that went into the building. The notes so given were extended to them as of payment. It appears that J. V. and R. T. Burkes owed the bank, to which the $38,000.00 worth of notes was disbursed, sums of money and procured an additional credit with the bank in the sum of $15,000.00. It was understood between the Natchez Investment Company, Inc., and the contractors, J. V. and R. T. Burkes, that the giving of the notes did not extinguish the lien that the contractors had upon the building, and this seems to have also been understood by the bank to which the notes were assigned. The appellant, Hartford Accident and Indemnity Company, was not consulted about this transaction and its consent thereto was not obtained. An arrangement was also made by the Natchez Investment Company, Inc., and by the Burkes with certain other materialmen, who had sold material to the Burkes to go into the hotel building, to accept the notes of the Natchez Investment Company for the amount of their [fol. 90] claims, with an understanding that their lien would not be released against the hotel property by taking the notes of the Natchez Investment Company, the owner thereof. This arrangement was not consummated with any of the parties furnishing material except the Williamson-Greer Company, whose claim was for $12,815.10. This note was due one year after date and was dated July 1, 1927, and bore interest at 6% per annum, and provided for attorney's fees and costs incurred in collecting the same, and recited that it was secured by a lien allowed by law to the payee as to the furnishing of material, labor and supplies in the construction of the Eola Hotel of Natchez, Mississippi. This note was made payable direct to Williamson-Greer & Company by the Natchez Investment Company, Inc., and J. V. and R. T. Burkes gave credit to the Natchez Investment Company, Inc. for the amount of this note on the contract price. The notes given to J. V. and R. T. Burkes were dated November 10, 1926, one

was for $28,823.00, due February 8, 1927, or ninety days after date, and bore interest at the rate of 8% from maturity until paid, and provided for 10% additional if placed with an attorney for collection. This note contained no recital of the reserving of the lien upon the hotel property for its payment, and was a negotiable instrument. The other two notes were for $5,000.00 each, dated November 10, 1926, and due ninety days after date, and bore interest at the rate of 8%, waived protest and notice of nonpayment, and also provided that the note might be extended without notice and without affecting the liability of any parties thereto, and if the makers should fail in business or become bankrupt, or have filed against them, or any of them, proceedings in involuntary bankruptcy or for the appointment of a receiver, this note and all other debts and obligations of the maker, direct or contingent, should immediately become due and payable; and that at the maturity of the note, or when otherwise due, as provided, any and all money, stocks bonds or other securities or [fol. 91] property of any nature whatsoever on deposit with or held by, or in the possession of, said bank as collateral or otherwise, to the credit or for account of the makers, endorsers or other parties hereto, or any of them, should be and stand applied forthwith to the payment of this note, or any other indebtedness due said bank by said parties or any of them; and if this note be not paid when due and it should be placed in the hands of any attorney, that a 10% attorney's fee should be paid. These notes seem to have been made upon a blank form of the New Orleans Bank & Trust Company of New Orleans, Louisiana, to which the notes were assigned by J. V. & R. T. Burkes.

On the hearing the chancellor rendered a decree against J. V. & R. T. Burkes and T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, and Hartford Accident & Indemnity Company. That said bond is a bond guaranteeing the faithful performance of the contract for the erection and construction of the Eola Hotel building in Natchez, Mississippi, and the surety on the bond is liable for the payment of the respective sums set forth, and decreed to be due and owing the creditors, or claimants, set forth in the judgment adjudging the said Hartford Acci-

dent And Indemnity Company and J. V. Burkes and R. T. Burkes, jointly liable to the said creditors in the amounts due to each in the sum set forth in the decree, and adjudging interest on the said sums due on the date they were due and at 6% from the date of judgment until paid. It also adjudged a fee to the attorneys representing the Natchez Investment Company, Inc., in the concursus proceedings in the sum of $5,000.00. It refused to allow attorneys' fees to the materialmen who were brought into court and had filed cross-bills seeking to reserve their right for material, but fixed what would be a reasonable fee and made a finding of fact of what would be reasonable in each case, should the liability be adjudicated in favor of the said claimants by the judgment of this court, setting [fol. 92] out specifically the amount each claimed. It reserved in the decree the future determination of the claim propounded by N. O. Nelson Manufacturing Company, as assignee of A. W. Moore, doing business as the Acme Engineering Company, who had obtained leave of the court to intervene in the cause as defendant and cross complainant. It also reserved for future adjudication the claim of New Orleans Bank & Trust Company which had brought a proceeding in the circuit court to establish a mechanics lien on the Eola Hotel, and which cause had been transferred to the chancery court.

We are of the opinion that the provisions of the contract for the construction of the hotel and the bond, constitute a bond under Section of Chapter 128, Laws of 1918, and that the bond inures for the benefit of the materialmen who furnished the material that went into the hotel, and that the operation of this law had the effect of writing into the bond provision for the payment of claims of persons furnishing labor or material under the said contract, as though it had been actually written therein, and that none of the provisions of the bond had the effect of writing out of the contract these provisions and could not have that effect. In other words, it is not competent, where the bond is given as provided by the act, to dispense with these stipulations. All stipulations contrary to the statutory provisions must be disregarded so far as persons furnishing labor or material *or* are concerned.

We are further of the opinion that the bond did not protect the note given by the Natchez Investment Com-

pany, Inc. to the Williamson-Greer Company. Between the Natchez Investment Company, Inc., and the appellant, the Hartford Accident & Indemnity Company, the provisions that payments should be made, as provided in the contract, in cash or current funds, was made, and the statute did not prevent their insertion in the contract. When [fol. 93] the Natchez Investment Company, Inc., gave these notes instead of paying cash, and contracted to reserve the lien on the hotel for the benefit of the holders of the notes it waived its right as against the surety company as to the claims flowing from the notes. By that contract between J. V. and R. T. Burkes, and the Natchez Investment Company, Inc., the Burkes, and the assignees of the Burkes, had a negotiable instrument of value against the Natchez Investment Company, Inc., and a right to resort to the hotel building for the satisfaction of that claim, but it had no right, after making this novation, which was done without the consent of the Hartford Accident & Indemnity Company, to charge the indemnity company with the loss occasioned by the failure or bankruptcy of the Natchez Investment Company, and the bankruptcy of J. V. & R. T. Burkes. The parties accepting these notes must look to the security which they accepted in lieu of their rights under the bond against the Hartford Accident & Indemnity Company. Parties taking and accepting the notes of the Natchez Investment Company under such circumstances have no greater rights than their assignors had, and they only succeed to whatever rights the contractors would have against the Natchez Investment Company, Inc. and the hotel, had the notes not been transferred to or assigned.

We are of the opinion that the court was correct in allowing $5000.00 fees to the attorneys instituting the concursus proceeding, and that the court was also correct in denying attorney's fees to the attorneys representing claimants or materialmen who were brought in or appeared in the suit to propound their claims under the proceedings. The contract and the statute do not contemplate payment of all attorneys who may be employed, but only a reasonable attorney's fee to the attorneys representing the proceedings known as concursus proceedings. The court was also correct in allowing interest on the claim of the several claimants, such claims bore interest from the date

[fol. 94] when they were due unless there is a contract to the contrary. This rule generally prevails as to contracts, and no reason is shown as to why it should not be applied in the present case.

It follows from these views that the judgment of the could below is affirmed as to the claims of all persons, except that allowed to Walter Williamson and A. A. Greer, doing business as Williamson-Greer & Company, for $14,833.42, which is reversed and the judgment disallowed; and the petition dismissed as to all parties, except the Natchez Investment Company, Inc. Affirmed as to O. L. Bunn; the Coburn Trolley Track Manufacturing Company; Gibbons & Gordon, Inc.; Hockaday, Inc.; The R. C. Lieb Company; Natchez Drug Company; National Show Case Company; Truscon Steel Company; White Stone Company, Inc.; Woodward, Wight & Company, Ltd.; R. Lee Parker, Jr.; R. Scudamore, Jr.; R. Lee Parker, Jr., and R. Hicks Parker, doing business as Burkett Sheet Metal Works; W. A. Jacobie; St. Bernard Cypress Company; Geisenberger Bros. Drug Company; M. P. Phelan; Enochs Lumber & Manufacturing Company; Southern G. F. Company; Feltus Bros. Hardware Company; Chamberlain Metal Weather Strip Company; Ingalls Iron Works; Capitol Paint & Glass Company; Mosler Safe & Lock Company. Affirmed as to attorneys' fees allowed in concursus proceedings, and reversed as to Williamson-Greer and Company.

Affirmed except as to Williamson-Greer Company.

[File endorsement omitted.]

[fol. 95] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY CO.

vs.

NATCHEZ INVESTMENT COMPANY ET AL.

JUDGMENT—Feb. 23, 1931

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of

Adams County, and this court having sufficiently examined and considered the same and being of opinion that there is partial error therein, doth order, adjudge and decree that the decree of the said Chancery Court, rendered in this cause January 6th, 1930, be and the same is hereby reversed, as to the decree of the court below rendering judgment in favor of Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co. of Dallas, Texas, for the sum of Fourteen Thousand, eight hundred and thirty-three and 42/100 Dollars, and said claim is hereby disallowed, and the petition of said appellee is dismissed as to all parties except the Natchez Investment Company. In all other respects the decree of said Chancery Court rendered as above stated is affirmed, both on direct and cross appeal. It is therefore, ordered, adjudged and decreed that the appellee O. L. Bunn, doing business as Bunn Electric Company, do have and recover of and from the appellant Hartford Accident & Indemnity Company, and that Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four thousand, seven hundred and ninety-three and 97/100 Dollars, the amount of the decree in the court below, together with the further sum of Two hundred and thirty-nine and 69/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the [fol. 96] rate of 6 percentum per annum; and

That the Coburn Trolley Track Mfg. Co., appellee, do have and recover of and from the appellant Hartford Accident and Indemnity Company and of Aetna Casualty & Surety Co., surety in the appeal bond, the sum of Three thousand, three hundred and forty-two and 76/100 Dollars, the amount of the decree in the court below, together with the further sum of one hundred and sixty-seven and 13/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that,

The appellee Gibbens and Gordon do have and recover of and from the appellant Hartford Accident Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Three thousand, seven hundred and fifty-five and 26/100 Dollars, the amount of the

decree in the court below, together with the further sum of One hundred, eighty seven and 76/100 Dollars, being damages at the date of 5 percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition in the court below, until paid at the rate of 6 percentum per annum, and that

Hockaday Inc., appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond the sum of Three thousand and thirty-seven and 39/100 Dollars the amount of the decree in the court below together with the further sum of One hundred and fifty-one and 86/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per [fol. 97] annum, and that

The R. C. Lieb Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One Thousand, three hundred and sixty-four and 12/100 Dollars, the amount of the decree in the court below together with the further sum of Sixty-eight and 21/100 Dollars being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 percentum per annum, and that

Natchez Drug Company, appellee, do have and recover of and from the appellant, Hartford Accident and Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of One hundred and forty-three and eighty-three one hundredths dollars, the amount of the decree in the court below together with the further sum of Seven and 19/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of said decree from the date of rendition in the court below until paid at the rate of 5 percentum per annum, and that

National Show Case Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Four hundred

and seventy-nine and 19/100 Dollars, the amount of the decree in the court below, together with the further sum of twenty-three and 95/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

[fol. 98] Schwartz & Stewart, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One hundred and seventy and 82/100 Dollars the amount of the decree in the court below, together with the further sum of Eight and 54/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Walter C. Schultz, doing business as Schultz Cabinet Works, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety on the appeal bond the sum of Four hundred and fifty-nine and 34/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-two and 96/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Southern Cement Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Two thousand and twenty and 06/100 Dollars, the amount of the decree in the court below, together with the further sum of One hundred and one Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

[fol. 99] Truscon Steel Company, appellee do have and recover of and from the appellant Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety

Company, surety in the appeal bond, the sum of Four Thousand, two hundred and twenty and 69/100 Dollars, the amount of the decree in the court below together with the further sum of Two hundred and eleven and 03/100 Dollars, being damages at the rate of 5 percentum, as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

White Stone Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Five hundred and seventy-nine and 06/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-eight and 95/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Woodward, Wight & Company, Ltd., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One thousand, eight hundred and forty-six 81/100 Dollars, the amount of the decree in the court below, together with the further sum of Ninety-two and 34/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

R. Lee Parker, Jr., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Com-
[fol. 100] pany and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Two thousand, two hundred and thirty-three and 78/100 Dollars, the amount of the decree in the court below, together with the further sum of One hundred and eleven and sixty-eight one hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

S. C. Scudamore, Jr., appellee, do have and recover of and from the appellant Hartford Accident & Indemnity

Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One thousand, six hundred and thirteen and 43/100 Dollars, the amount of the decree in the court below, together with the further sum of Eighty and 67/100 Dollars, being damages at the rate of 5 per-centum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Four thousand, five hundred and twenty-one and 29/100 Dollars the amount of the decree in the court below, together with the further sum of Two hundred and twenty-six and 06/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

[fol. 101] C. R. Burkett, doing business as Burkett Sheet Metal Works, do have and recover of and from the appellant Hartford Accident and Indemnity Company, and of Aetna Casualty Company, Surety in the appeal bond, the sum of Three thousand and thirty nine and fifty-five one hundredths Dollars, the amount of the decree in the court below, together with the further sum of One hundred and fifty-one and 97/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 5 percentum per annum, and that

W. A. Jacobie, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four thousand, five hundred and Thirty-seven and 54/100 Dollars, the amount of the decree in the court below, together with the further sum of Two hundred and twenty-six and 87/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of six per centum per annum, and that

St. Bernard Cypress Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Three hundred and thirty-two and 80/100 Dollars, the amount of the decree in the court below, together with the further sum of Sixteen and 64/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from the date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

[fol. 102] Geisenberger Bro. Drug Company, appellee, do have and recover of and from appellant, Hartford Accident & Indemnity Company, and Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Eighty-eight and 74/100 Dollars, the amount of the decree in the court below, together with the further sum of Four and 43/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

M. T. Phelan, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of One hundred and thirteen and 50/100 Dollars, the amount of the decree in the court below, together with the further sum of Five and 67/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 per centum per annum, and that

Enochs Lumber & Mfg. Co., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Ten thousand and three and thirty-eight one hundredths Dollars, the amount of the decree in the court below, together with the further sum of Five hundred and Sixteen one-hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 per centum per annum, and that

Southern G. F. Company, appellee do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Three thousand, six hundred and seventy-two and 17/100 Dollars, the amount of the decree in the court below, together with the further [fol. 103] sum of One hundred and eighty-three and 60/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Feltus Brothers Hardware Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty Company, surety company, surety in the appeal bond, the sum of Four hundred and thirty-six and 97/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-one and eighty-four one-hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

Chamberlain Metal Weather Strip Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four hundred and seventy and 47/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-three and fifty-two one-hundredths Dollars, being damages at the rate of 5 percentum, as allowed by law, as well as interest on the amount of said decree from the date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Ingalls Iron Works appellee do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Six hundred and thirty-eight and 58/100 Dollars, the amount of the decree in the court below, together with the further sum of Thirty-one and 97/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of

[fol. 104] said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Capital Paint & Glass Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Five hundred and ninety-three and 58/100 Dollars, the amount of the decree in the court below together with the further sum of Twenty-nine and 67/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Mosler Safe & Lock Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Two hundred and fifty-one and 93/100 Dollars, the amount of the decree in the court below, together with the further sum of Twelve and 59/100 Dollars, being damages at the rate of 5 percentum as allowed by law, and also interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Appellee, Natchez Investment Company, Inc., and/or I. Levy, Receiver for the Natchez Investment Company, Inc., or T. S. Sholers, Trustee in Bankruptcy for Natchez Investment Company, incorporated, for attorneys' fees for services rendered by Engle & Laub do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Suretv Company, surety in the appeal bond, the sum of Five Thousand Dollars, the amount of the decree in the court below, together with the further sum of Five hundred Dollars, being dam-[fol. 105] ages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum. It is further ordered, adjudged and decreed that the costs on appeal be apportioned as follows:

That Walter Williamson and A. A. Greer, co-partners, doing business as Williamson-Greer Company of Dallas,

Texas, and Hattie B. Laub and Gerard Brandon, sureties in the appeal bond of said appellee do pay one-fourth of the costs of this appeal to be taxed, and that the appellant, Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, surety in the appeal bond, do pay three-fourths of the costs on appeal, and that the costs in the court below be paid as directed in said decree.

[fol. 106] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR ON BEHALF OF HARTFORD ACCIDENT & INDEMNITY CO.—Filed Mar. 21, 1931

Now comes the appellant, Hartford Accident & Indemnity Company, and suggests error in the opinion of the Court heretofore rendered in this case in the following particulars, to-wit:

1. In allowing attorney's fees to the Natchez Investment Company, Inc., in the sum of $5,000.00.

2. In affirming the judgment in favor of W. A. Jacobie.

3. In the allowance of interest on the amounts adjudged due the claimants.

4. The construction placed by the Court upon Chapter 128, Laws of 1918, is in conflict with the previous opinion of the Court in this case as reported in 155 Miss. 31, 119 So. 366, and the opinion on this appeal, as applied to the facts in this case, renders Chapter 128, Laws of 1918, unconstitutional for the following reasons:

(a). In that said opinion construing the statutes constitutes the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 14 of the Constitution of the State of Mississippi.

(b). In that the opinion makes a contract between persons without their consent and gives a class of persons [fol. 107] rights without the consent of the party to the contract.

(c). In that the opinion constitutes an impairment of the liberty of contract by this appellant.

(d). In that the opinion denies to this appellant the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e). Because it is not within the police power of the State to pass such an act as the laws of 1918, as construed by this court in this opinion.

* * * * * * *

LV

We shall argue the constitutional phases together.

Upon the previous hearing of this cause, which involved the constitutionality of Chapter 128, Laws of 1918, the court pointed out that there was a vast difference between that act and Chapter 217, Laws of 1918, the public contract bond act and in discussing the impairment of the freedom of contract the Court stated and italicized that the constitutionality of the statute was saved by the provisions that the parties might write into the contract any clauses and conditions which they saw fit to insert therein. The Court pointed out that this provision of Section 3 of the act, which gave the parties full liberty of contract and permitted them to include such terms and conditions as they saw fit, saved the constitutionality of the Act even though it further provided that if such a bond were given there should be written therein protection for materialmen.

On the instant appeal the Court was met face to face with this situation: The parties had written into the contract various terms and provisions, the breach of which [fol. 108] would void the bond; the proof showed that the bond had been breached, not in one provision but in many and that proof was unchallenged and as a matter of fact came from the complainant itself and from the claimants. Therefore, there was no liability to complainant, Natchez Investment Company, Inc., the obligee of the bond, and unless the statutory provision stood on a separate footing from the contractual provisions the bond was void as to the claimants.

The opinion of the Court has ruled that the terms and provisions which the parties inserted are secondary to the statutory provisions in protecting the materialmen.

We submit that such construction renders the Act unconstitutional for the reasons detailed above. The opinion is illogical when construed with the former opinion in this case.

The instant opinion overlooked the fact that Chapter 128, Laws of 1918, in the very section which makes provision for the protection of materialmen, provides that the parties may insert all terms and conditions which they see fit and overlooks the controlling fact that this right is as much statutory as the right of materialmen created by the same section. Both rights are created by the statute, and recognized by the statute.

The statute did not provide that the right of the materialmen is prior to the rights of the parties nor that the provisions shall be separable from the provisions which the parties insert. The general rule of law is that if the contract is void as between the parties thereto it is void as to all persons claiming through it and especially is this true where the claimants are a class of third persons not named in the contract.

We are fully aware that the United States Supreme Court has ruled, in the Federal Public Contract Bond Act, that the clause for the protection of materialmen constitutes a separable contract. This is true under Chapter 217, Laws of 1918, but those statutes involve the right of the [fol. 109] sovereign to dictate its own terms and not the right of the sovereign to dictate to private parties what their contract shall be nor the right of the sovereign to say by statute that the right of one not a party to a contract shall be superior to the right of another person who makes a contract.

We contended on the first appeal that the statute was not within the police power of the state, that it did unlawfully impair the freedom of contract and the Court saved it by pointing out that the law permitted the parties to contract as they please. The Court now denies that right by the present opinion and gives to persons not parties to the contract, rights superior to those of the persons who made the contract.

In short the Court's opinion holds that the legislature may dictate and determine what the terms of the contract between parties may be, that the legislature may say that persons not parties to a contract have a higher right under it than the parties who made it, in the face of the provision of the contract that it should not inure to the benefit of any one not a party thereto.

If that is not an impairment of the freedom of contract in an unconstitutional way in violation of both the State and Federal Constitutions, if it does not constitute the taking of property without due process of law under those constitutions and if it does not deny to this appellant the equal protection of law under those constitutions, we are frank to say that we cannot conceive of a statute or of the decision which ever could be so classed.

It is respectfully submitted that the suggestion of error should be sustained, the case reversed and dismissed.

Respectfully submitted.

(Signed) Wells, Jones, Wells & Lipscomb, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 110] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

NATCHEZ INVESTMENT COMPANY, INC., et al.

OPINION ON SUGGESTION OF ERROR—Filed June 15, 1931

ETHRIDGE, P. J.:

Suggestions of error have been filed on behalf of appellant and of certain appellees which have had the individual consideration of each of the judges of this division, and after such consideration, we have decided that they should be overruled.

On behalf of the appellant, it is earnestly insisted that it was error to allow attorney's fees, that neither the stat-

ute nor the bond provided for attorney's fees, and that the allowance of the fee was, therefore, error. In the consideration of the case on the former appeal, reported in 155 Miss. p. 31, 199 So. 366, we held that when a bond is executed by a contractor in favor of the builder, which refers to a contract between the builder and the contractor, requiring the contractor to execute a bond for the faithful performance of the contract, and provides, in general terms, plans and specifications of the building to be erected and the bond, which reserved to the building company the right at its option to take over and finish the contract should the contractor fail, and other rights, such bond will be construed in connection with the contract referred to in the bond and made a part of the bond contract; and, where it is apparent from a consideration of the bond and the contract referred to that it was the intention of the bonding company, the builder, and the contractor to execute the bond required by section 3, chapter 128, Laws of 1918, it [fol. 111] will be held to be such a bond." Turning to the contract between the contractor and the owner, considered in connection with the bond, in Article 30 of the contract, it is provided:

"It shall be the ovligation of every contractor and subcontractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect; contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificates which will be required of him before final payment is made under this contract. The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary."

Under the contract which the bond was given to secure, the attorney's fees were provided for expressly, and it must have been within the contemplation of the parties making the bond and the parties looking to it that the bond was given to displace the materialmen's liens given by the statute under Sections 1 and 2. But it is said that there is no such proceeding in Mississippi as a concursus proceeding. The contract was drawn in Louisiana where concursus proceedings exist; and it is substantially an interpleader between all parties interested in such proceedings that they may all be brought in court at one time and all rights de- [fol. 112] termined in one suit. The proceeding here is substantially in accord with a concursus proceeding in Louisiana, and there is no error in the allowance of the attorneys' fees. The attorneys' fees appear to be large considering the function of the attorneys bringing it; but the chancellor had the matter before him with proof, and is in better position to determine the reasonableness of the amount of fees than is this court. There is no substantial merit in the contention of the appellant in the suggestion of error. The last decision, 132 So. 535, does not change the decision in 155 Miss. That opinion is referred to in the beginning of the last opinion, and the two are to be taken together. While parties have a cons-itutional right to make private contracts, and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for materialmen and laborers which private contracts cannot displace; and where the contractor gave the bond contemplated by the contract and thus secured the benefit of displacing the liens of the materialmen, he cannot dispense with the requirements of the statute under Section 3 that the bond given shall secure the rights of the materialmen and laborers. It was, of course, optional to give the bond or leave the statute in force, but, having given the bond, the statutory conditions must remain embraced in the bond, and, as stated, before, the statute has the effect of writing the conditions in the bond therein provided. The suggestion of error on behalf of the appellant is overruled.

For the appellee, Williamson-Greer Company, it is suggested that we erred in holding that this company had waived its right under the bond. The provision of agreement relied upon, made upon the trial of the cause, to sustain this proposition reads as follows:

"That the said Williamson-Greer Company have received as security for their said claim a note of the Natchez Investment Company, Inc., for the amount of the claim, se-
[fol. 113] cured by a mortgage on the Eola Hotel and Levy Office Building at Natchez, Mississippi.

"That if it should be finally held in this cause by the Court that the bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as Surety on the terms and conditions as shown by the pleadings in this cause was and is a bond guaranteeing the faithful performance on the part of the said J. V. & R. T. Burkes, contractors, of their contract for the construction of said Eola Hotel Building under said Project # 640, as alleged by the pleadings in this cause and same is still in force then that the said Williamson-Greer Company is entitled to a judgment against the Hartford Accident and Indemnity Company for the full amount herein sued for and demanded as hereinabove agreed and as alleged in the cross bill of complaint filed by Williamson-Greer Company, but the Hartford Accident & Indemnity Company does not agree that they are additionally liable for interest and attorney's fees to said Williamson-Greer Company, but the question of liability for interest and attorney's fees is left to the court as a matter of legal construction under the contract documents and bond; however, it is agreed that said Williamson-Greer Company has been required to come into this proceeding as a creditor for the enforcement and protection of their rights and that it has been necessary for them to employ attorneys, to wit: Engle & Laub of Natchez, Mississippi, and that they have thereby incurred reasonable attorneys' fees for the service required and to be required in the prosecution of their claim to final judgment; and that such pro-
[fol. 114] ceedings have become necessary by reason of the failure of the contractors, J. V. & R. T. Burkes, to pay the amount of their indebtedness to the said Williamson-Greer Co."

The counsel for Williamson-Greer Company seem to give small attention to the part of the agreement "and same is still in force." The effect of the decision formerly rendered is that the Williamson-Greer Company waived its right, or was estopped to assert its right, on the bond

by reason of having taken the obligations of the Natchez Investment Company secured by lien on the hotel building. A party cannot thus deal with the bond; he could look to the bond and demand payment for the material furnished under it, but he cannot violate the terms of the bond as to what the contractor was to receive in payment, or the materialman, for the material furnished. The bond stipulated that the materialmen and contractor should be paid in money. This was an important provision for the protection of the surety on the contractor's bond. There is quite a difference in having money, which is accepted by all persons in satisfaction of all demands, and in taking a mere note and lien; and it is well known that for cash a better bargain can be secured than one on credit secured by note and lien. The Williamson-Greer Company took their security, and whether they intended to waive their right against the bond or not in doing so is not controlling. The question is,—did their conduct in so doing operate as a waiver and estoppel of their right to resort to the bond. The securities taken were not taken by the consent of the surety, and we think the Williamson-Greer Company waived its rights to resort to the bond and that it must look to the security which they took apart from the bond.

Suggestion of error overruled.

[File endorsement omitted.]

[fol. 115] In Supreme Court of Mississippi, Division B

28877

Hartford Accident & Indemnity Company

vs.

Natchez Investment Company

Order Overruling Suggestion of Error—June 15, 1931

This cause came on to be heard on suggestion of error filed herein and the court having sufficiently examined and considered the same doth order that said suggestion of error be and the same is hereby overruled.

[fol. 116] IN SUPREME COURT OF MISSISSIPPI

PETITION FOR APPEAL—Filed July 25, 1931

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

The petition of the Hartford Accident & Indemnity Company, a corporation, respectfully shows:

1. That on the 15th day of June, 1931, in the Supreme Court of Mississippi, being the highest court of the State of Mississippi in which a decision of the suit hereinafter referred to could be had, a final judgment, adverse to petitioner, was rendered in the case in said court pending in which petitioner, said Hartford Accident & Indemnity Company was appellant and O. L. Bunn, doing business as Bunn Electric Company, The Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Company, Natchez Drug Company, National Show Case Company, Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Company, Truscon Steel Company, White Stone Company, Inc., Woodward, Wight & Company, Ltd., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Company, Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co. of Dallas, Texas, C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, St. Bernard Cypress Co., Geisenberger Bro. Drug Co., M. P. Phelan, Enochs Lumber & Mfg. Co., Southern G. F. Co., Feltus Bros. Hardware Co., Chamberlain Metal Weather Strip Co., Ingalls Iron Works, Capitol Paint & Glass Co., Mosler Safe & Lock Company, J. V. & R. T. Burkes, T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, a partnership, and J. V. & R. T. Burkes, individually, New Orleans Bank & Trust Company, and Natchez Investment Company, Inc., were appellees, the same being an appeal from the Chancery Court [fol. 117] of Adams County, Mississippi, in a civil suit in equity.

2. Petitioner desires that said decision be reversed, on appeal, by the Supreme Court of the United States; and

to that end files this its petition for the allowance of an appeal in said case.

3. In said case there was drawn in question the validity of a statute of the State of Mississippi, viz: Chapter 128 of the Laws of 1918, as enacted by the Legislature of the State of Mississippi at the 1918 session, which law is also found in Hemingway's Code of Mississippi, 1927, Sections 2596 to 2603, both inclusive, on the ground of its being repugnant to the Constitution of the United States and the decision in said case was in favor of the validity of said statute.

4. This petition is accompanied by an assignment of errors.

Wherefore petitioner prays the allowance of the appeal, returnable to the Supreme Court of the United States and for the issuance of citation and for a supersedeas, in conformity to the laws and rules of practice in and for such cases made and provided; and that the errors complained of may be examined and corrected and that the judgment complained of be reversed.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Petitioner, Hartford Accident & Indemnity Co.

[fol. 118] [File endorsement omitted.]

[fol. 119] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 25, 1931

Said Hartford Accident & Indemnity Company, in connection with its petition for the allowance of an appeal in said case presents this its assignment of errors and says that the decision, judgment and decree of the Supreme Court of Mississippi, rendered in said case is erroneous and unjust to the appellant in the following respects:

1. That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved

March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918, (Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive) upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated is not invalid as being repugnant to the Constitution of the United States, as being a law of said State which deprives persons upon whom it operates of liberty and property without due process of law.

[fol. 120] 2. That the Supreme Court of Mississippi erred in holding and deciding that Section 3 of said Statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without due process of law.

3. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Fourteenth Amendment of the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right to-wit; the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, "shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract" the bond should be void and the bond further provided that it should not "apply to nor cover guarantees * * * for the furnishing of any bond" under the contract between the landowner and the contractor," and the bond further provided that "no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee named therein," by a holding that under said statute said bond

was also subject to the additional obligation prescribed by said statute "that such contractor shall promptly make payments to all persons furnishing labor or material under said contract" and that the bond would inure to the benefit of material men and that breaches of its conditions by [fol. 121] the obligor would not be a defense by the surety against the claims of said materialmen. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving material men, furnishing material to the contractor, a right of action in the bond for the value of their materials furnished, despite the contractural provisions of the bond to the contrary.

4. Because the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnacy of said statute to the Constitution of the United States.

5. Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi and in rendering judgment and decree in favor of materialmen and against said appellant, Hartford Accident & Indemnity Company on said bond.

6. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its

repugnance to the Fourteenth Amendment to the Con-
[fol. 122] stitution of the United States.

7. That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said State.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Appellant, Hartford Accident & Indemnity Company.

[File endorsement omitted.]

[fol. 123] IN SUPREME COURT OF MISSISSIPPI

ORDER GRANTING APPEAL—Filed July 25, 1931

On this the 14th day of July, 1931, the Hartford Accident & Indemnity Company, having presented its petition for the allowance of an appeal in the suit in the Supreme Court of Mississippi, in which the Hartford Accident & Indemnity Company is the appellant and O. L. Bunn, doing business as Bunn Electric Company, The Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Company, Natchez Drug Company, National Show Case Company, Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Company, Truscon Steel Company, White Stone Company, Inc., Woodward, Wight & Company, Ltd., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company, Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Company of Dallas Texas, C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, St. Bernard Cypress Co., Geisenberger Bro. Drug Co., M. P. Phelan, Enochs Lumber & Mfg. Co., Southern G. F. Co., Feltus Bros. Hardware Co., Chamberlain Metal Weather Strip Co., Ingalls Iron Works, Capitol Paint & Glass Co., Moseler Safe & Lock Company, J. V. & R. T. Burkes, T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, a partnership, and J. V. & R. T. Burkes, individually, New Orleans Bank & Trust Company

and Natchez Investment Company, Inc., are the appellees, in which final judgment was, in said court, rendered against said appellant on the 15th day of June, 1931, in order to appeal said suit to the Supreme Court of the United States and to obtain a supersedeas of the final judgment or decree in said suit:

The petition is granted and the appeal is allowed and this shall operate as a supersedeas of the judgment or [fol. 124] decree in said suit upon said Hartford Accident & Indemnity Company giving, within the time provided by law, a bond in the sum of Ten Thousand & no/100 dollars *dollars,* payable to the adverse parties jointly and severally, conditioned that the said Hartford Accident & Indemnity Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[fol. 124a] [File endorsement omitted.]

[fols. 125 & 126] Bond on appeal for $10,000, approved and filed July 25, 1931, omitted in printing.

[fols. 127-137] Citation, in usual form, showing service on Green, Green & Jackson et al., filed July 25, 1931, omitted in printing.

[fol. 138] IN SUPREME COURT OF MISSISSIPPI

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 25, 1931

To the Clerk of the Supreme Court of Mississippi:

The Hartford Accident & Indemnity Company, the appellant in an appeal, which has been allowed by the Chief Justice of the Supreme Court of Mississippi, to the Supreme Court of the United States from the decision, judgment and decree of the Supreme Court of Mississippi in the case of Hartford Accident & Indemnity Company v. Natchez Investment Co., Inc., et al, (being numbered in said court

as No. 28 877) on appeal in said Supreme Court of Mississippi from the Chancery Court of Adams County, in which final judgment was rendered in the Supreme Court of Mississippi on June 15, 1931, files now this præcipe to indicate to you the portion of the record to be incorporated in the transcript in appeal, and to direct you to make a true transcript of the same and to certify the same as such under your hand and official seal and transmit the same within thirty days from the date hereof to the Supreme Court of the United States at Washington, D. C., viz:

(1) The bill of complaint and the exhibits "A", "B" and "C" thereto, but omitting the specifications (pages 16 to 128 of the transcript) except the following portions of said specifications (included in Exhibit "B") to-wit:

The first paragraph of the same (at top of page 17 of the transcript), under the heading "Intention";

Article 30, under heading "Guaranty Bonds" (bottom page 31 and top of page 32 of transcript);

Article 32, under heading "Liens" (page 32 of transcript);

Article 33, under heading "Assignment" (page 32 of transcript);

First and third paragraphs of Article 30, (page 41 of [fol. 139] transcript);

(2) The demurrer of Hartford Accident & Indemnity Company to the Bill of Complaint. (Pages 437 to 439 of transcript.)

(3) The decree of the Chancellor overruling the demurrers. (Page 897 of the transcript.)

(4) The opinion and judgment of the Supreme Court of Mississippi on the appeal from the Chancellor's decree overruling the demurrer.

(5) The decree rendered in the case of the Chancery Court of Adams County on January 10, 1930. (Pages 1638 to 1647 of the transcript.)

(6) The opinion and judgment of the Supreme Court of Mississippi, rendered on appeal from the final decree of the Chancery Court of Adams County.

(7) The suggestion of error filed in the Supreme Court of Mississippi to the opinion and judgment of the Supreme Court of Mississippi.

(8) The opinion and orders of the Supreme Court of Mississippi on the suggestion of error including the order overruling the suggestion of error on June 15, 1931.

This July 14, 1931.

L. Barrett Jones, Arthur G. Powell, Attorneys for Appellant, Hartford Accident & Indemnity Co.

[File endorsement omitted.]

[fol. 140] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUPPLEMENTAL PRÆCIPE—Filed July 29, 1931

To the Clerk of the Supreme Court of Mississippi:

St. Bernard Cypress Company, an appellee, in an appeal which has been allowed by the Chief Justice of the Supreme Court of the State of Mississippi to the Supreme Court of the United States from the decision in the case of Hartford Accident & Indemnity Company v. Natchez Investment Company, et al., (being numbered in said Court as #28,-877) on appeal in said Supreme Court of Mississippi from the Chancery Court of Adams County, Mississippi, and on which final judgment was rendered in the Supreme Court of Mississippi on June 15th, 1931, file now this præcipe to indicate to you the additional portions of the record to be incorporated in the transcript in said appeal to the United States Supreme Court and to direct you to make a true transcript of said additions and certify the same as such in the record under your hand and official seal and transmit the same within the time allowed by law from the date hereof to the Supreme Court of the United States at Washington, D. C., viz:

(1) The following parts or portions of the specifications (included in Exhibit "B" to the bill of complaint and found at pages 16 to 128 of the transcript):

Paragraph (a) at page 19 of the transcript.
Paragraph (e) on page 20 of the record.
Paragraph (g) on page 20 of the record.

Article (2)—"Execution, Correlation and Intent of Documents" found at page 20 of the record.

Article (9)—"Materials, Appliances, Employees" found at page 22 of the record.

Article (26)—"Payments Withheld" found at page 30 of the record.

[fol. 141] Third paragraph under heading "Contracts" found at page 17 of the record, also commencing with the words, "The contractor agrees, etc.," on page 34 of the record, including paragraphs (d), (e), (f), (g) and (h) through the word "sub-contractor" found on page 35 of the record.

(2) Answer and Cross bill of said St. Bernard Cypress Company found Volume I, Pages 229 to 257 of the Record, excluding the exhibits following.

(3) Amended Cross Bill St. Bernard Cypress Company, found Volume Five, page 1107.

(4) Agreed statement of facts between Hartford Accident & Indemnity Company and St. Bernard Cypress Company, found Volume Six, pages 1225 to 1228.

This July 31, A. D., 1931.

W. A. Geisenberger, By Garner W. Green, Attorneys for St. Bernard Cypress Company, an Appellee.

Certificate

I, Garner W. Green, an attorney for the above named Appellee, hereby certify that I have this day personally delivered a true copy of the above and foregoing præcipe to Hon. L. Barrett Jones, Attorney for Appellant. This July 31st, A. D., 1931.

Garner W. Green.

Received this July 31, 1931.

L. Barrett Jones.

[fol. 141a] [File endorsement omitted.]

[fol. 142] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Sept. 8, 1931.

In pursuance of Paragraph 9 of Rule 13 of the Supreme Court, the appellant, Hartford Accident and Indemnity Company, herewith files with the Clerk of the Supreme Court of the United States the statement of points on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof, to-wit:

The appellant relies on the point that the liberty of contracting as to private business is a right protected by the 14th Amendment of the Constitution of the United States; that a statute of a state which arbitrarily denies or materially abridges this right is therefore unconstitutional and void; and, specifically, that the statute of the State of Mississippi, designated as Chapter 128 of the Laws of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, sections 2596 to 2603, inclusive) is for these reasons unconstitutional.

[fol. 144] The particular portion of the statute to which the objection of unconstitutionality especially relates, in this case, is the 3d section, which provides that "When any contractor or sub-contractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or materials under said contract," and that though the bond omit this additional obligation, persons furnishing labor and material shall have a right of action on the bond to the same extent as if it were contained in the bond.

The point most seriously relied on arises under the 3d section of the Act, and under the construction given to that section by the Supreme Court of Mississippi in the present case. The bond which the landowner and the appellant, which is a surety company, agreed on in this case was carefully drawn to prevent its falling within the purview of the

Act. Its condition was not "for the faithful performance of the contract," but to "indemnify the obligee against loss or damage directly caused by the failure of the principal to perform the contract." A condition of it was that breaches of the contract by the obligee would avoid the bond. It provided against assignment of the funds due the contractor; and that on notice of any lien in favor of a materialman the funds due the contractor should be withheld by the obligee until the lien was discharged. It was provided that the bond was not to cover any provision of the contract "for the furnishing of any bond," and that no suit should be maintained on the bond by or for the use of any one except the obligee.

The point is relied on that the Supreme Court of Missis- [fol. 145] sippi in deciding that such a bond fell within the purview of the statute and that the provisions of the bond by which it was sought to deny to materialmen a right of action on it were ineffectual and that the provisions which made the bond void if the underlying contract was breached could not be used in defense against the liability arising under the statute in favor of materialmen, thereby, for the purposes of appeal to this Court, enlarged the scope of the language of the Act itself; and that its constitutionality will be tested in this Court according to the effect produced by the construction of the Supreme Court of Mississippi.

The point is, therefore, relied on that the statute deprives a landowner, contracting to have work done of a purely private nature and affected with no public use or interest, and a company engaged in the surety business of the liberty of contracting for the indemnifying of the landowner against loss directly arising from breaches of the contract by the contractor except upon the condition that the surety shall unconditionally become liable for all claims of materialmen; and that as thus construed and applied, the statute is an arbitrary and unconstitutional interference with private liberties and property rights.

The point is relied on that the statute, as construed and applied by the Supreme Court of Mississippi, cannot be upheld, as against the constitutional objection, on the ground that its enactment is within the police power of the State.

The point is relied on that the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor

sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the bill of complaint, so far as relates to grounds 3, 4, 5, 6, 7, 8, 9 and 10 of the demurrer, which attack the statute stated above for repugnancy to the [fol. 146] United — Constitution, (a) because of its unwarranted interference with the freedom of contract of the owner of the property, the contractor and the surety of the contractor, (b) because it is a legislative attempt to make a contract between persons without their consent and to give to third persons rights in a contract without the consent of the contracting parties; and thereby deprives the appellant of liberty and property without due process of law and denies it the equal protection of the law.

The appellant, in filing its præcipe for transcript, has included therein only such parts of the record as are, in the judgment of its counsel, necessary to the consideration of the points set forth above. Hence the appellant designates as necessary to the consideration of these points the entire record as transmitted to this Court.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Appellant, Hartford Accident and Indemnity Company.

[fol. 147] The undersigned, as counsel of record for the following appellees: Enochs Lumber and Manufacturing Company, Ingalls Iron Works, and Capitol Paint & Glass Company, acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to right to dismiss.

Sept 1, 1931.

Marcellus Green, Garner W. Green.

[fol. 148] The undersigned, as counsel of record for the following appellees: O. L. Bunn, doing business as Bunn Electric Company; The Coburn Trolley Track Mfg. Co.; Gibbens & Gordon, Inc.; Hockaday, Inc.; The R. C. Leib Company; Natchez Drug Company; National Show Case Company; Schwartz and Stewart; Walter C. Schultz, doing business as Schultz Cabinet Works; Southern Cement Company; Truscon Steel Company; White Stone Com-

pany, Inc.; Woodward, Wight & Company, Ltd., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss. This September 2, 1931.

Brandon & Brandon, by G. O. H. Brandon.

[fol. 149] The undersigned, as counsel of record for the following appellees: C. R. Burkett, doing business as Burkett Sheet Metal Works, acknowledge- service of the statement of points relied on and designation of parts of the record filed by the appellant, as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss.

E. H. Ratcliff.

[fol. 150] The undersigned, as counsel of record for the following appellees: W. A. Jacobie, Geisenberger Bro. Drug Company, and M. P. Phelan, St. Bernard Cypress Co., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant it being necessary for the consideration of said points.

Kennedy & Geisenberger, by W. A. Geisenberger.

[fol. 151] The undersigned, as counsel of record for the following appellees: Mosler Safe and Lock Company, acknowledge- service of the statement of points relied on and designation of parts of the record filed by the appellant, it being necessary for the consideration of said points, but without recognizing that any judgment has been validly taken or validly made and without prejudice to the rights to dismiss.

Joseph E. Brown.

[fol. 152] The undersigned, as counsel of record for the following appellees: Natchez Investment Company, Inc., R. Lee Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Company; R. Scudamore, Jr., and R. Lee Parker, Jr., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the

consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss.

Chas. F. Engle, S. B. Laub.

[fol. 153] The undersigned, as counsel of record for the following appellees: Southern G. F. Company; Feltus Brothers Hardware Company; Chamberlain Metal Weather Strip Company; and Capital Paint and Glass Company, acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points.

Martin V. Byrnes, per W. C. Martin.

[fol. 154] [File endorsement omitted.]

Endorsed on cover: File No. 36,147. Mississippi Supreme Court. Term No. 333. Hartford Accident & Indemnity Company, appellant, vs. O. L. Bunn, doing business as Bunn Electric Company, et al. Filed August 29, 1931. File No. 36,147.

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CHARLES ELMORE CH

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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

No. 333

OCTOBER TERM, 1931

JURISDICTIONAL STATEMENT

W. CALVIN WELLS,
L. BARRET JONES,
(Jackson, Miss.)
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
(Atlanta, Ga.)
Attorneys for Appellant.

Dickerson Printing Co., Atlanta

In The Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

JURISDICTIONAL STATEMENT

(Under Rule 12)

(Note—The references to the record are to the paging of the record as transmitted by the Clerk of the Supreme Court of Mississippi.)

1.

The jurisdiction of the Court is sustained by Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, §344(a)) wherein it is provided that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court; and by the provisions of the Act of Congress of January 31, 1928, c. 14, §1, 45 Stat. 54, abolishing writ of error and providing that all relief theretofore

obtainable by writ of error should thereafter be obtainable by appeal.

2.

The date of the judgment or decree sought to be reviewed is June 15, 1931, as is shown on page 115 of the record. The date on which the application for appeal was presented is July 14, 1931, as is shown on page 124 of the record.

3.

The case is an appeal from the final judgment of the Supreme Court of Mississippi affirming the decision of the Chancery Court of Adams County, Mississippi, is an equitable action instituted by the Natchez Investment Company against the appellant, Hartford Accident & Indemnity Company, in which suit various other parties became intervenors, claiming relief against the appellant. (Record pp. 116 to 125).

The suit was instituted by the Natchez Investment Company filing its bill of complaint in equity against the appellant on a bond given by a contractor with the appellant as surety in connection with the erection of a hotel and against materialmen who had furnished materials to the contractor. (Record pp. 2 to 27.) The materialmen, though named as defendants, were really plaintiffs, as the suit was instituted for their use under the Mississippi statute involved in this case.

The prayer of the complaint was, so far as presently material, that the bond on which the appellant was surety be adjudicated to be a bond within the purview of Chapter 128, Laws of 1918, State of Mississippi, being §2598 of the Hemmingway's Code of 1927, and that judgment be rendered thereon in favor of the various materialmen who had

furnished materials in the building of the hotel. (Record, p. 11.) A copy of the bond was attached as an exhibit and made a part of the bill of complaint. (Record, Exhibit "C" to the bill of complaint, following p. 27 of the record.)

The appellant filed a demurrer in which it made the defense that, if the statute was so construed as to make it apply to a bond such as the appellant had written and as to give materialmen a right of recovery thereon, it was repugnant to the 14th Amendment of the Constitution of the United States, as depriving it and the obligee therein, respectively, of the liberty of contract, and because it was, also, a legislative attempt to make a contract between persons without their consent and to give third persons a right of action on a private contract without the consent of the contracting parties, in violation of their rights under the due-process-of-law clause and the equal-protection-of-the-law clause of the 14th Amendment of the Constitution of the United States. (Record pp. 50 to 52.)

The demurrer having been overruled in the trial court (Record p. 53), the Hartford Accident & Indemnity Company appealed to the Supreme Court of Mississippi and the Court affirmed the judgment of the trial court, holding that the bond fell within the purview of the statute and that the statute was constitutional; and remanded the case to the trial court for further proceedings. (Opinion of Supreme Court, Record pp. 60 to 73; judgment of affirmance and remand, Record p. 74.) The trial there resulted in a decree in favor of the materialmen. (Record pp. 75 to 85.) The Hartford Accident & Indemnity Company again appealed to the Supreme Court of Mississippi. The Court again affirmed the judgment of the trial court; and enlarged the scope of its former construction of the statute, as will be more fully stated later herein. (Opinion of Supreme Court, Record pp. 86 to 94; judgment and decree of Supreme Court, Record pp. 95 to 105.)

The Hartford Accident & Indemnity Company filed a suggestion of error, under the Mississippi practice (Record pp. 106 to 109), but, after argument, the Supreme Court of Mississippi rendered a third opinion and overruled the suggestion of error, thus making its former decree final. (Opinion, Record pp. 110 to 114; order overruling suggestion of error, p. 115.)

That the substantial nature of the constitutional question may more clearly appear, it is necessary to state the terms of the statute and the construction given to it by the Supreme Court of Mississippi; for it is by that construction that this Court will determine whether it is repugnant to the Constitution. It will also be necessary to state certain provisions of the bond, in order that the opinion of the Supreme Court of Mississippi may be the better understood.

The statute relates only to private work. In §1 it creates liens in favor of materialmen, etc. In §2 it forbids assignments of the contract price by contractors unless the bond provided for in §3 be given. In §3 it is provided that "when any contractor or sub-contractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or material under said contract," and that though the bond omit this additional obligation, persons furnishing labor or material shall have a right of action on the bond to the same extent as if the omitted obligation had been contained therein.

The bond, which was carefully drawn to prevent its falling within the purview of the statute, did not undertake to

"guarantee the performance of the contract," but only "to indemnify the obligee against loss or damage directly caused by failure of the principal to perform the contract;" and this indemnity was granted only on the express condition that it should be void if the obligee breached the contract with the contractor, or if the obligee consented to any assignment of the contract price or if the obligee, after notice of any lien, failed to withhold the funds due the contractor. It was also expressly provided in the bond that it was not to cover any provision of the contract for the furnishing of any bond; also that no suit should be maintained on the bond by or for the use of any one except the obligee. (See copy bond, Exhibit "C" to complaint following p. 27 of Record.)

On the first appeal the Supreme Court construed the statute as applicable to such a bond; but decided against the constitutional attack on the statute on account of its alleged arbitrary interference with the liberty of contracting as to purely private business; pointing out that the statute left it purely optional with the landowner whether he would take the bond, and also pointed out that the statute allowed the parties to the bond to insert therein such provisions as they saw fit. (Record pp. 68 to 73.)

When the case came back on the second appeal and it appeared that the conditions of the bond had been breached by the obligee, that the obligee had breached the underlying contract, had participated in assignments of the purchase price and had failed to withhold funds after notice of liens, the Supreme Court enlarged the scope of the statute by the holding that while the statute permitted the parties to the bond to insert such provisions as they saw fit, that such provisions would not be enforceable against the materialmen. (Record pp. 86 to 94.) This was adhered to in the rehearing granted on the suggestion of error. (Record pp. 110 to 114.)

The net effect of the three decisions is that while a landowner has the liberty of taking no bond from a contractor, under penalty of having a lien on his property, still he and a surety company have not the liberty of so contracting as to indemnify the landowner against direct loss and damage from the failure of the contractor to perform the contract, upon conditions mutually satisfactory to them, without also giving to the contractor's creditors for materials an unconditional right of action on the contract of suretyship.

There is also the holding that the statute has the effect of forbidding the parties to the bond, which the landowner is seeking for his special protection, from contracting that the surety on the bond shall not be liable to third persons not parties to the contractual covenants; even though the contract relates to purely private subject-matter, not connected with any business affected with public use or interest.

The attack on the statute is made in the appellant's demurrer to the bill of complaint; so that it has not been thought necessary or proper to bring to this Court all the volumes of the record taken on the trial in the lower court. But it has been thought necessary to bring here the opinions of the Supreme Court on the second appeal and the suggestion of error; for it is from the construction of the statute in these subsequent opinions that its deprivation of the liberty of private contracting most clearly appears.

The assignments of error in the record (Record pp. 118 to 123) make point that the statute as written and as construed by the highest court of the State of Mississippi is repugnant to the due-process-of-law clause and the equal-protection-of-the-law clause of the 14th Amendment of the Constitution of the United States, because of its arbitrary interference with and deprivation of the rights of private contract as to persons falling within its terms and purview, as thus construed.

4.

AUTHORITIES CITED TO SUSTAIN THE JURISDICTION

The statute (Judicial Code §237, U. S. C. A. Title 28, §344(a)) is deemed adequate authority to sustain jurisdiction generally, since the case is literally within its terms.

That the constitutional question is substantial and not frivolous:

The state courts have usually held such provisions as are contained in the Mississippi statute to be unconstitutional:

Gibbs v. Tally, 133 Cal. 373; 65 Pac. 970.

Montague v. Furness, 145 Cal. 205; 78 Pac. 640.

Williams v. Baldwin (Tex.) 228 S. W. 554.

Hess v. Denham L. Co. (Tex.) 218 S. W. 162.

Stinson Mill Co. v. Braun, 136 Cal. 122; 57 L. R. A. 726.

Kelly v. Johnson, 251 Ill. 135; 95 N. E. 1068; 36 L. R. A. (N. S.) 573.

That this Court has jurisdiction to declare void State statutes which unreasonably infringe upon the liberty of contracting as to private subject-matter, see:

Tyson v. Banton, 273 U. S. 418; 71 L. ed. 718.

Ribnick v. McBride, 277 U. S. 350; 72 L. ed. 913.

Woolf v. Industrial Court, 262 U. S. 522; 57 L. ed. 1103.

Smith v. Cahoon (decided by U. S. Supreme Court May 25, 1931).

Near v. State (decided by U. S. Supreme Court June 1, 1931.

The right to contract about his own affairs is a part of the liberty of the individual protected by the due-process clause of the Federal Constitution.

Adkins v. Children's Hospital, 261 U. S. 525; 67 L. ed. 785; 24 A. L. R. 1238, and cases cited in the course of the opinion.

(It is to be noted that this case does not fall within the second exception stated to the general rule as announced in the opinion just cited, "Statutes relating to contracts for the performance of public work," as the work in this case was purely private.)

In determining the constitutionality of a statute the Supreme Court tests it by its operation and effect accordingly as the State court has construed it.

Near v. Olson (decided by U. S. Supreme Court June 1, 1931) and cases cited in the opinion.

No question as to the constitutionality of the statute so far as it imposes a lien on property is involved. The constitutional point here made is that the statute deprives the landowner and the surety company of the liberty of contracting for the indemnification of the former against direct loss to him, under special conditions agreed on between the parties, except upon the condition that the surety company at the same time shall assume an unconditional liability to third persons (the materialmen); even though the landowner is willing to have the lien of materialmen attach to

his property; and though the parties to the contract of indemnity expressly agree that it shall not inure to the benefit of such third persons.

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
Attorneys for the Apellant.

Arthur G. Powell

Of Counsel for Appellant.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

No. 333

OCTOBER TERM, 1931

BRIEF FOR APPELLANT

W. CALVIN WELLS,
L. BARRETT JONES,
(Jackson, Miss.)
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
(Atlanta, Ga.)
Attorneys for Appellant

Dickerson Printing Co., Atlanta

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(Paragraph 1 of Rule 12 as to jurisdictional statement has been previously complied with.)

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STATUTE CITED

Chap. 128 Mississippi Laws of 1918.
Hemmingways Code of Mississippi S.2598.

IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

No. 333

OCTOBER TERM, 1931

Appeal from the Supreme Court of Mississippi

BRIEF FOR APPELLANT

The first opinion of the court below is found in 155 Miss. 31 (119 So. 366). Subsequent opinions are not yet officially reported, but are to be found in 132 So. 535 and 135 So. 497.

STATEMENT OF THE CASE

The case involves solely the constitutionality of a statute of Mississippi (Chapter 128, Laws of 1918, State of Mississippi; Hemmingway's Code § 2598).

A full copy of the statute is set out in an appendix hereto.

Briefly, the parts of the statute material here may be summarized as follows:

Section 1 gives to a materialman (and as used herein the word "materialman" will include subcontractors and laborers, as well as materialmen in the strict sense) who have not been paid by a contractor engaged in private construction, the right to give the landowner notice of their claims and thereby bind the funds due by the landowner to the contractor, and creates a lien in their favor accordingly.

Section 2 prohibits a contractor from assigning the contract or the proceeds thereof, with a proviso that this section shall not apply if the bond provided for in section 3 be given.

Section 3 (the section which is the subject of the constitutional attack herein) provides:

> "That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein, for which payment has not been made, shall

have the rights to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee."

The Natchez Investment Company filed suit (R. 1) in one of the Chancery Courts of Mississippi against J. V. & R. T. Burkes as contractors, the appellant, Hartford Accident & Indemnity Company as surety on the contractor's bond, and a number of materialmen, alleged to have claims against the complainant under the statute above referred to, and the New Orleans Bank and Trust Company, to whom it is alleged the contractors had assigned a part of the purchase price. The complaint set out that the complainant had contracted with the contractors for the erection of a hotel—the contract being attached as an exhibit and made a part of the complaint (R. 10-17); that the contractors gave the complainant a bond with the present appellant as surety thereon—a copy of the bond being also attached as an exhibit and made a part of the complaint (R. 17-20); that it had received notice from various other defendants that they had furnished materials in the construction of the hotel and had not been paid by the contractors; that they had been notified by the New Orleans Bank that the contractors had assigned to it a large portion of the contract price and that unless the bond exhibited as a part of the complaint be held to be such a bond as to satisfy the requirements of the statute above referred to, the assignment to the bank was void.

The complainant prayed that the bond be held to be such a bond as is provided for in the statute aforesaid; that the validity of the assignment to the New Orleans Bank be determined; that materialmen claiming liens should be required to assert them in the action and for the adjustment of all equities between the parties. (R. 9.)

The present appellant, the surety on the bond, filed its demurrer (R. 39) making the points:

(1) That the bond showed on its face that it was not such a bond as the statute contemplates;

(2) And that it did not guarantee faithful performance of the contract within the meaning of the statute;

(3) That if the bond should be construed as coming within the terms of the statute, then that law itself is void as an unwarranted interference with the freedom of contract as against the landowner, the contractor and the contractor's surety, and, therefore, violates the "due-process-of-law clause" of the 14th Amendment of the Constitution of the United States.

(4) That the statute further violates the same provision of the Constitution insofar as it prohibits assignment of the purchase price by the contractor, in that it is an unwarranted interference with the freedom of contract.

(5) That it is not within the power of the legislature of Mississippi to create a contract between persons sui juris;

(6) And that so to construe the law would constitute the taking of property without due process of law in violation of said clause of the Constitution.

(7) That the section of the law (§ 3) which requires that the contractor's bond when given at the instance of the owner shall protect third persons not named in the bond is unconstitutional and void in that it is an attempt by the legislature to

(a) make a contract between persons without their consent;

(b) give a class of third persons rights without the consent of the parties to the contract, and thereby constituting an absolute infringement of the freedom of contract;

(8) And therefore said statute violates the aforesaid provision of the Constitution;

(9) And that it is not within the police power of said State to pass such an Act.

The demurrer was overruled and appeal taken to the Supreme Court of Mississippi. (R. 41.)

The Supreme Court on this interlocutory appeal held (R. 46) (R. 54) that while the State has no such power to deal with the contracts of private persons as it has to deal with the contracts of public bodies, still it did have some power of regulation and that the statute did not go beyond constitutional limits in this respect.

In emphasizing the point that the parties had freedom of contract even as to the nature of the bond itself, the Court in its official opinion (155 Miss. 31; 119 So. 366) in quoting, in this context, the part of section 3 of the statute which refers to the nature of the statutory bond, italicises the portion as to its "containing such provisions and penalties as the parties thereto may assert therein"—though in printing this opinion in the transcript in this case (R. 55) the italics are not shown.

The Court then held that the bond in the record was such a bond as came within the provisions of the statute.

The case having been remanded for further trial (R. 57), a decree was had in the Chancery Court (R. 57) finding against any right of the original complainant to recover, but awarding judgments against the present appellant in favor of the various materialmen; and the surety company again appealed.

The further proceedings in the case after the decision by the Supreme Court of Mississippi that the statute was not vio-

lative of the U. S. Constitution are not material to a decision of the questions presented in the appeal; except insofar as they show a final judgment against the appellant and except insofar as the subsequent decisions by the Supreme Court in the case disclose the construction, range and effect which that Court, as the highest court of the State, gives to the statute; but are material for these purposes.

So far as the first opinion discloses, it was left open to the appellant to enforce the provisions in the bond and to rely upon the breach of conditions therein as a defense against liability, except the provision that no right of action on the bond should accrue for the benefit of anyone other than the obligee named therein. The judgment overruling the demurrer of legal necessity, negatived the right to enforce this term of the contract. From the opinion in the second appeal (R. 67) it appears that the bond had been so breached by the obligee in various respects as to render it void, under its written terms and conditions; but the Court held (R. 72) that when the bond was given the statute wrote into it the statutory obligation in favor of materialmen and that none of the provisions of the bond in conflict wherewith could be given effect (R. bottom p. 72).

Final judgment and decree of the Supreme Court of Mississippi was rendered in accordance with the opinion just stated. (R. 74.)

The present appellant filed what is called, in the Mississippi practice, a suggestion of error.

In this suggestion of error (R. 83) the Federal constitutional questions were again presented in view of the broader construction given to the statute by the Court in its second opinion. The suggestion of error was entertained by the Court; and, after a discussion of the constitutional questions, was overruled (R. 90). In connection with the overruling of the suggestion of

error, the Court rendered its third opinion (R. 86), reiterating (R. 88) its prior holding that "while parties have a constitutional right to make private contracts, and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for materialmen and laborers which private contracts cannot displace."

The appeal to this Court was thereupon perfected.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

1. That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918, [Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive] upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated is not invalid as being repugnant to the Constitution of the United States, as being a law of said State which deprives persons upon whom it operates of liberty and property without due process of law.

2. That the Supreme Court of Mississippi erred in holding and deciding that Section 3 of said statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without the process of law.

3. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Four-

teenth Amendment of the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right, to-wit: the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, "shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract" the bond should be void and the bond further provided that it should not "apply to nor cover guarantees . . . for the furnishing of any bond" under the contract between the landowner and the contractor," and the bond further provided that "no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee named therein," by a holding that under said statute said bond was also subject to the additional obligation prescribed by said statute "that such contractor shall promptly make payments to all persons furnishing labor or material under said contract," and that the bond would inure to the benefit of material men and that breaches of its conditions by the obligor would not be a defense by the surety against the claims of said materialmen. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving materialmen, furnishing material to the contractor, a right of action in the bond for the value of their materials furnished, despite the contractual provisions of the bond to the contrary.

4. Because the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnancy of said statute to the Constitution of the United States.

5. Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi, and in rendering judgment and decree in favor of materialmen and against said appellant, Hartford Accident & Indemnity Company, on said bond.

6. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its repugnance to the Fourteenth Amendment to the Constitution of the United States.

7. That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said State.

ARGUMENT

SUMMARY

1. This Court will determine the constitutionality of the statute not on its literal words alone, but upon the construction and effect given it by the highest court of the State of Mississippi. The statute attacked is unconstitutional on its face; but especially so under the construction given it by the state court.

2. The decisions of the Supreme Court of Mississippi in this case, construing the statute, will themselves be construed together and will be interpreted in the light of the facts to which the language of the opinions relate.

3. It was necessary for the Court to construe the statute to determine whether the bond in the case was such a bond as fell within the purview of the statute.

4. The bond did not purport to follow the statute by "guaranteeing the faithful performance of the contract," but only to give to the obligee a modicum of indemnity against direct loss and damage and to give this only on certain express conditions or contingencies; and the bond expressly provided that no right of action should accrue on it to or for the benefit of any one other than the named obligee.

5. The Supreme Court of Mississippi, in its first opinion, construed the statute as extending to such a bond.

6. On the second appeal, the Court held that despite the fact that the parties were at liberty to insert in the bond such provisions and conditions as they saw fit, the statute prevented any force or effect being given to any such provisions or conditions

insofar as they defeat the right of materialmen to have a full, unconditional right of action on the bond.

7. The effect of the three decisions is that the statute under attack has the effect of preventing a landowner and a surety company from contracting for the conditional indemnification of the landowner against direct loss and damage under a building contract unless the parties are also willing to agree that third persons (the materialmen) may also have an unconditional right of action on the bond for debts due them by the contractor; even though the parties expressly agree as one of the conditions on which the surety assumes liability, that such third persons shall have no rights under the contract.

8. As thus construed, the statute abridges the liberty of the landowner of contracting for his own personal indemnification in a purely private matter; and abridges the liberty of the surety of contracting to give that indemnification on terms mutually satisfactory to the surety and the landowner.

9. It gives to third persons contractual rights, superior to those of the parties themselves, in a purely private contract, without the assent or consent of the parties thereto and against the express terms of the contract as consented to by the original parties.

10. The case involves no question as to how far a State may regulate the business of corporate suretyship.

11. The validity of the statute insofar as it merely creates a lien in favor of materialmen is not involved in the case.

12. The right to contract as to one's own affairs is the part of the liberty protected by the due-process-of-law clause of the Constitution; and statutes materially and arbitrarily affecting this liberty are void.

13. The jurisdiction of this Court over the constitutional questions is complete, since the action was based on the statute attacked and the constitutionality of the statute was raised by demurrer. In such cases this Court will put its own interpretation on the bond and the bill of complaint; and is bound by the decisions of the State Court only as to the construction it has put on the statute in applying it to the admitted facts presented.

It is axiomatic that this Court, in determining the constitutionality of a State statute, will not look alone to the words of the statute, but will narrow or broaden its meaning and practical effect accordingly as the highest Court of the State has construed it and applied it. If the attack be made for violation of the due-process-of-law clause of the Constitution, this Court will uphold the statute, even though on its face it appears to violate the constitutional provision, if the State Court has so construed it and applied it as to eliminate the offending features of it. On the other hand, though the statute be fair on its face, or if it be so worded as that it might be construed and applied either in a constitutional way or in an unconstitutional way, and the highest court of the State, having the statute before it for construction and application, construes it and applies it in such a way as to introduce into it an element, which would make it, as thus construed and applied, deprive any person of life, liberty or property without due process of law, this Court must invalidate it, even though as an original proposition, this Court would not give it any such construction or effect.

Supreme Lodge v. Meyer, 265 U. S. 30; 68 L. ed. 885.

Near v. Minnesota, 283 U. S. 697; 75 L. ed. 1357.

Even on its face the statute appears to be unconstitutional. For the legislature to say that if a contractor, making a contract

with a private person, for work of a non-public nature, enters into a bond with such person guaranteeing the performance of his contract, he must insert into the bond an obligation in favor of third persons, even though such third persons be his prospective creditors, or the law will insert the additional obligation, seems to be an unconstitutional interference with the liberty of contract. However, the construction given by the state court to the statute makes it go so much further in this direction that this phase of the case may be left with the mere mention of it.

The decisions of the Supreme Court of Mississippi, insofar as they construe and apply the statute in question, must themselves be construed and interpreted in connection with the factual elements to which the language used in them applies. In simpler words, we mean to say that to understand the meaning and effect of these decisions, we must read them in connection with the facts (including the bond itself, as one of the facts) with which they were dealing, and in connection with the questions presented by the record before the court at the time of the various decisions.

Furthermore, we think we are reasoning soundly when we assert that, while it is in the last two decisions that the Court most clearly gives to the statute the interpretation and effect which, from our point of view, renders it repugnant to the Constitution, still it is by the construction given to the statute by the Mississippi court in these last decisions, as well as in the first one, that this Court will determine its scope and constitutional validity, even in passing on assignments of error relating to rulings on the demurrer which raised the questions of its constitutionality and which was the subject of the first appeal, and, therefore, of the first decision. In passing, however, we may note that these constitutional questions were again presented to the Court by the suggestion of error which the Court

entertained, discussed and overruled; and this we understand is sufficient of itself to give this Court jurisdiction over these questions as applied to the whole case.

Mallet v. North Carolina, 181 U. S. 589; 45 L. ed. 1015.

Leigh v. Green, 193 U. S. 79; 48 L. ed. 623.

Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673; 74 L. ed. 1107.

It is only fair to the Mississippi court to read all three of the opinions together, as if they were a single opinion, especially since in the last opinion that Court so declares. (R. middle of p. 88.)

So let us look at the decisions in this light.

Reading the bond in this case and reading the statutes, it is perfectly plain that the landowner and the surety company undertook to make a special contract for the indemnification of the landowner in such a way as to give the landowner a modicum of protection, on certain clearly expressed terms and conditions, and in such a way as not to subject the surety to the enlarged liability imposed by the statute.

For example, the statute speaks of a bond "guaranteeing the faithful performance of such contract." The condition of the bond in the record (R. 18) is that "the principal shall *indemnify* the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract"—two very different things both in law and in fact; and even this indemnity was itself not absolute, but was conditioned upon certain clearly defined contingencies.

We shall not overlook the fact that the Supreme Court of Mississippi in its opinions (R. 56, R. 87) laid great stress upon

the fact that the bond on its face recites that "whereas the principal and the obligee have entered into a certain written contract . . . to construct Eola Hotel building . . . a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof;" and that in the contract thus referred to there is a provision (Article 30, R. 16) that it shall be the obligation of the contractor to include within his bid the furnishing of a bond conditioned as the law of Mississippi requires and that this bond shall protect *the owner* against all liens or claims against the building according to the laws of the State of Mississippi; and another provision (R. 17) that the contractor's bondsmen shall obligate themselves to all the terms and covenants of specifications and of the contracts covering the work; though in another portion of the contract to which the Supreme Court of Mississippi made no reference (R. 15) the landowner reserved the right to vary the form of this bond. Reading the bond and the contract together, it is most manifest that the parties were studiously attempting to draw a special contract which would not impose on the surety the liability imposed in § 3 of the statute.

As later shown in this brief, this Court will construe the contract for itself, and is not bound by the construction of the State Court.

However, no matter how fully we may consider these provisions and every other provision of the contract between the contractor and the landowner as being incorporated into the bond in the part of it where the reference to this contract is made, nevertheless there is no escape from the fact that the written contract between the landowner and the surety, as expressed in the bond, did not stop at this point; for the language referring to the contract between the contractor and the surety is immediately followed by stating the conditions which attach to the obligations of the bond (not merely the obligation to pay

the penal sum of the bond, $316,812, but also such obligation as the surety may have assumed by the reference to the underlying contract) and on the happening of which the bond should be void. (R. 18.)

In addition to the main condition that the bond should be void if the principal should indemnify the owner against loss or damage directly caused by the failure of the principal faithfully to perform his contract, certain other express conditions precedent to liability on the part of the surety were inserted. Among these conditions were:

(a) that the obligee should at all times and in the manner specified in the contract comply with his obligations assumed under the contract (R. 18);

(b) that notice should be immediately given the surety of any default on the contractor's part, with right on the surety's part to take over the contract and complete it (R. 18).

(c) that if there came to the [illegible]ce or knowledge of the obligee that there was any [illegible]laim against the contractor for unpaid labor or material, the obligee should not make any further payments to the contractor until such claims were satisfied. (R. 19.)

(d) that the bond should not cover any guarantee in the contract "for the furnishing of any bond" (R. 19, bottom page). (It may be seen that if the reference earlier made in the bond to the underlying contract had the prima facie effect of writing into the bond the provision as to giving any bond, this express condition had the effect of excluding it); and

(e) that payments to the contractor should be made in cash only (R. 20, ¶ 7 of the conditions);

(f) that "no right of action shall accrue upon or by reason hereof, to or for the benefit of any one other than the obligee named herein." (R. 20.)

The contract itself provided (R. 16) against assignments of the contract price without the owner's consent.

With this bond before it, and with the statute before it, the Supreme Court of Mississippi in its opinion (R. 55, near bottom of page) asks this question: "Does the bond given in the present case come within the provisions of Section 3; in other words, is it such a bond as is provided for therein?"

This made it necessary for the Court to construe and apply the statute. If it answered the question in the negative, the surety's demurrer was well taken; and the New Orleans Bank's assignment of the contract money was invalid, under § 2 of the Act. If it answered the question in the affirmative, it exposed the statute to the constitutional attack also made in the demurrer; but left the Bank's assignment of the funds valid. The Court had already quoted and underscored the portions of § 3 of the statute, that the prescribed bond could contain "such provisions and penalties as the parties thereto may assert therein." It thereupon held that the bond in the record was such a bond as the statute contemplated and that the bank's assignment of the funds was good.

The effect of this decision was to construe the statute as not requiring an unconditional bond and as including within its purview a bond such as the one before it, even though one of the conditions in it was that no right of action on it should accrue in favor of or for the use of any materialmen, and though there were other provisions in it which rendered liability on it wholly conditional. It might have been more logical for the

Court to construe the statute as requiring an unconditional bond; but the Court did not so construe it.

The State Court in its first opinion (R. 54, 55) seems to assume that the constitutional objections to the statute is answered by the holding that the landowner has free choice between giving the bond and allowing the funds in his hands to become subject to the statutory lien—that the statute did not compel the landowner to take any bond at all. This construction of the statute (that section 3 of the Act insofar as it provides for the taking of a bond is not mandatory on the landowner) would have had the effect of avoiding the point that it would be violative of the Constitution to require mandatorily that a landowner give a bond to protect materialmen, if any such point had been made. But that is not the point at all.

The constitutional point raised in the record, on both the appeals, is that while the landowner has the choice under the statute of taking no bond (though a failure to do so impounds the funds in his hands to the extent stated in the statute) or of taking a bond which will give a right of action also to the materialmen, the statute denies him the liberty of taking a bond for his own immediate protection (though he is willing to have the funds impounded, if occasion therefor should arise) unless he also takes a bond for the benefit of the materialmen; also, that it denies a surety, who, as in the case at bar, is willing to indemnify a landowner against direct loss or damage from the contractor's failure to perform the contract, but is unwilling to assume any obligations to materialmen, from so contracting with his obligee as to escape this added liability and increase of risk.

Nor can the questions involved be fully grasped unless we keep in mind that, under the statute, in the absence of a bond, the rights of materialmen are limited to that portion of the

contract price which is unpaid at the time notice is given of their claims, but that if a bond be given the liability to materialmen is not limited even to the total contract price, but only by the amount of the claims themselves, whatever that amount may be.

The point was squarely made that if the statute were so construed as to include within its purview—and especially within the purview of that portion of Section 3 which provides that though the parties omit from the bond the additional obligation in favor of the materialmen, the bond shall nevertheless inure to their benefit "the same as if such stipulations had been incorporated in said bond," and gives the materialmen a corresponding right of action on the bond—a bond, such as the one in the case at bar, wherein the additional obligation was not only omitted, but wherein there was an express condition that it should not inure to the benefit of materialmen, the statute was unconstitutional for its abridgement of the liberty of contract.

Without discussion, the Court, in its first opinion, merely decided against the constitutional attack on this ground, by an affirmance of the Chancellor's decree overruling the demurrer which presented this question.

How far the Court had gone in construcing this provision of the statute as to the additional obligation of materialmen did not definitely appear until the Court had the case before it on the second appeal. The facts then presented made it necessary to give further construction to this provision of the statute. The bond was plainly conditional on its face. Even if the parties had written into it the obligation in favor of the materialmen, in the same place in the bond and in the same context as the obligation in favor of the landowner was written, still both of these obligations would have been followed by the express con-

ditions which were in terms made conditions precedent to any liability under the bond. As shown in the statement of facts prefacing the second opinion (R. 67-70), the conditions on which the surety was to be held liable were broken in a number of respects (though for present purposes it is sufficient to state only one—that the owner paid the contractor in notes instead of cash; a violation of the seventh condition of the bond) (R. 20). No recovery could be had on the bond unless the Court held that these conditions could be read out of it as the result of legislative fiat.

The Court then held (R. 72) that the statute prohibited the parties to the bond from entering into any stipulation which would affect the statutory obligation. Or as the Court put it, in passing on the suggestion of error, with reargument of the constitutional questions (R. 84-86): "While the parties have a constitutional right to make private contracts and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for materialmen and laborers which private contracts cannot displace."

Here we have a construction of the statute which squarely presents one of the constitutional question we are making. For the two decisions taken together mean and must mean that while the parties to the contract are allowed perfect freedom as to what they will agree on and insert into the contract between them, as expressed in the bond, the statute nevertheless prohibits the giving of any effect to such provisions.

It seems to us idle to speak of "freedom of contracting," when the only freedom is to allow the parties to agree on contractual relationships as a mere matter of writing them down, with the statute nullifying the effect of them as soon as they are written down.

When the three decisions are construed together, we have before us the plain, simple holding of the Supreme Court of Mississippi, that the statute under attack in this case is to be construed as preventing a landowner and a surety from contracting for the conditional indemnification of the landowner against direct loss under a binding contract unless the parties also are willing to agree that the surety on this conditional bond by which this modicum of indemnity is secured shall also be liable to certain third persons (the materialmen) whose right of action on it shall be absolute and not subject to the conditions the parties have agreed on. The statute is also construed as prohibiting the surety from contracting to indemnify the landowner only; even though in express terms, and as a part of the very contract by which the surety's liability is assumed and is to be measured, it is expressly provided that it shall not inure to the benefit of any one except the landowner.

The practical effect of such a construction of the statute is well illustrated by the ruthless disregard of private rights which the facts of this case present. What is called the bond in this case is in form a bond, but it is more than that; it is a special contract. There is a manifest practical difference, to landowner, to contractor and to surety, between a special contract (though in form of a bond) which merely conditionally indemnifies the landowner against direct loss and a bond which also unconditionally assumes liabilities to materialmen—unknown and undisclosed at the time the contract of suretyship is entered into, and unlimited in amount. The premium to be paid by the landowner and the risk of the surety are wholly different. The number of contractors who can give bonds in large sums for the protection of materialmen is comparatively small; since the chief element here to be considered is financial responsibility. The number of contractors who can give bond only for the owner's protection against failure to complete the

contract is much larger; for here the contractor's personal skill and his reputation for honesty are more controlling; especially where the surety on the bond reserves the right to complete, if the contractor fails; and payments are to be withheld except as the work progresses. Hence, when the owner requires only the latter form of bond, the number of contractors who can bid is materially increased, and the landowner gets the benefit of the competition and a lessening of the contract price.

Under the bond, as written in this case, the surety's risk was comparatively small, until it was extended by statutory fiat; and yet a comprehensive plan for the protection of all parties was specially agreed on in the terms set out in it. If the landowner paid the contractor only as the work progressed, and paid only in cash so that the contractor would be able to pay his bills for labor and materials promptly; and if, on notice of any such unpaid claim as would create a lien against the landowner or his property, the landowner should hold up the balance of the contract price; and if, as provided in the contract, the contract price could not be assigned, and the surety had the right to come in and complete the work, upon failure of the contractor, with right to receive the balance of the contract price so far as necessary to reimburse itself—if this plan set out in the bond and contract had been pursued, the surety's risk was small. Nor would any rights of materialmen under § 1 of the statute in question have been prejudiced, for their lien on the funds extends only to the balance due the contractor at the time the notice is given the landowner; and the bond provides that the landowner, upon receipt of such notice, should hold up the balance due the contractor.

And yet the surety in this case, which was so careful to limit its liability to the risk just indicated, is, as a result of the construction and application of the statute, confronted with an adjudged liability of some $75,000; notwithstanding the land-

owner with whom the surety contracted began almost as soon as the bond was signed to violate its provisions, to make payment in its notes instead of cash, to consent to assignments of the contract price, to fail to hold up the contractor's money after notice of claims, etc.

Also upon the authority of the statute attacked, the Supreme Court of Mississippi has held this surety to be liable to those to whom it contracted not to be liable, and has held that the statute also prevents it from asserting in defense of its liability the very conditions on which it consented to assume liability at all.

A statute which includes within its purview any such effect certainly deprives the parties of liberty of contracting. Our contention is that the denial of the right to contract in these respects is arbitrary and beyond the power of the State.

In passing, we may notice another matter to exclude it from the argument. While the surety in this case is a corporate surety—an insurance company—the case involves no question as to how far a State may regulate the contracts of corporate sureties or insurance companies. The statute in question does not relate to corporate surety business. It affects private and corporate sureties alike.

Nor is the validity of the statute, insofar as it creates a lien in favor of materialmen, in question.

To provide, as this statute in its first and second sections provides, for an automatic lien on funds due the contractor, in the nature of a garnishment in favor of materialmen, upon notice given the landowner, is neither arbitrary or unreasonable, though the freedom of contracting between the landowner and the contractor may in a sense be abridged. For the landowner

would not be called on to pay more than he contracted to pay. The statute in this respect has merely provided convenient machinery for applying the funds of the contractor to the payment of his debts. Natural equities in favor of the materialmen, as creditors of the contractor, give reason and constitutional validity to such a provision.

But far different it is for the statute to say that the landowner cannot exercise his constitutional liberty of protecting himself against direct loss on account of the contractor's failing to perform the contract, unless he and the person willing to furnish this special and personal indemnity also so contract as that the surety shall be unconditionally liable to the materialmen, whether their claims exceed the contract price or not. And still further different it is for the statute (as construed by the court) to say that whenever the landowner and a surety make such a special contract of indemnity and expressly agree that they and they alone shall be parties to it and entitled to its benefits, the law will nevertheless, without their consent and over the express terms of the contract, insert into the contract an obligation in favor of the materialmen, thus making a conditional promise to indemnify the landowner an unconditional promise to pay third persons.

Courts cannot make contracts for persons sui juris (*Cheney v. Libby*, 134 U. S. 68; 33 L. ed. 818); nor can the legislature do so without violating the liberty guaranteed by the Fourteenth Amendment of the Constitution.

The fact that the liberty of contracting is impaired by indirection instead of by direct means is immaterial. For a statute to prevent the terms of a contract from being enforced according to their natural tenor and effect is violative of the Fourteenth Amendment of the Constitution, though the prohibition of the statute operates indirectly rather than directly.

New York Life Insurance Co. v. Dodge, 246 U. S. 357, 377; 62 L. ed. 772, 783.

The right to contract as to one's own affairs is a part of the liberty protected by the due-process-of-law clause of the Constitution.

On this point we feel that we need only cite

Adkins v. Children's Hospital, 261 U. S. 525; 67 L. ed. 785.

For in that case the prior authorities are fully collected and discussed. The exceptional cases in which liberty of contract can be abridged are also set forth and distinguished.

As was said by the Court of the law then before it, so also it is true of the statute herein attacked, "It is not a law dealing with any business charged with a public interest, or with public work, or to meet and tide over a temporary emergency. . . . It is not for the protection of persons under legal disability, or for the prevention of fraud."

See also *Mayer v. Nebraska*, 262 U. S. 390; 67 L. ed. 1042.

The state courts have usually held such provisions as are contained in the Mississippi statute void.

Gibbs v. Tally, 133 Cal. 373; 65 Pac. 970.

Montague v. Furness, 145 Cal. 205; 78 Pac. 640.

Williams v. Baldwin (Tex.) 228 S. W. 554.

Hess v. Denham L. Co. (Tex.) 218 S. W. 162

Stinson Mill Co. v. Braun, 136 Cal. 122; 57 L. R. A. 726.

Kelly v. Johnson, 251 Ill. 135; 95 N. E. 1068; 36 L. R. A. (N. S.) 573.

State statutes which so materially abridge the liberties of private persons in contracting as to their private affairs are violative of the Fourteenth Amendment of the Constitution.

Tyson v. Banton, 273 U. S. 418; 71 L. ed. 718.

Ribnick v. McBride, 277 U. S. 350; 72 L. ed. 913.

Woolf v. Industrial Court, 262 U. S. 522; 67 L. ed. 1103.

Smith v. Cahoon, 283 U. S. 553; 75 L. ed. 1264.

The building of a private structure is a purely private matter, affected with no public use or interest. Materialmen are in no true sense wards of the State; though through the powerful lobbies which their associations maintain they have made strenuous efforts in various States to have themselves treated as if they were, and have succeeded in a number of States in having statutes passed to give them special privileges. A part of the present nationwide depression may well be traced to the effect of some of these statutes—none of which, so far as we have observed, goes quite as far as the Mississippi statute in infringing private rights of landowners—since the inability of so many otherwise eligible contractors to give surety bonds has increased the cost of construction to where landowners are unwilling to contract for the erection of buildings. If there be a public interest involved in the subject-matter, it is not on that side of the question which would uphold this statute.

In conclusion: The jurisdiction of this Court to pass upon the question whether the attacked statute is void because violative of the U. S. Constitution cannot be successfully challenged on any suggestion that the decision of the Supreme Court of Mississippi can be supported on any non-federal ground.

The defendant (now appellant) raised the question of the repugnancy of the State statute to the United States Constitution at the threshold of the case by demurrer to the original bill of complaint; the grounds of demurrer being in substance that no action could be maintained, under the statute, on the bond, because the statute was unconstitutional (R. 17). There is nowhere in the record any suggestion of liability on the bond, otherwise than under the statute. The Supreme Court of Mississippi necessarily based its judgment against the appellant on its construction of the statute and by applying the statute as thus construed to the bond. Under the pleadings, the Court did not and could not decide the case adversely to the appellant without deciding adversely to the contention of the appellant made in the demurrer, and in the suggestion of error, that the statute was unconstitutional.

St. Louis & I. M. R. Co. v. Starbird, 243 U. S. 592; 61 L. ed. 917.

The constitutional question having arisen by demurrer, the ordinary rule, that this Court accepts as final the conclusion of facts made by the state court, does not apply. The only thing binding on this Court is the state court's construction of its statute.

Truax v. Corrigan, 257 U. S. 312; 66 L. ed. 254, and cases therein cited.

Fiske v. Kansas, 274 U. S. 380; 71 L. ed. 1108.

Appleby v. New York, 271 U. S. 364; 70 L. ed. 992.

"It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether

the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment, and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution.

Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 86, 68 L. ed. 569, 572, 44 S. Ct. 247 and cases cited."

Coolidge v. Long, 282 U. S. 582, 75 L. ed. 562.

"When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purposes, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court."

Coppage v. Kansas, 236 U. S. 1, 15; 59 L. ed. 441, 446.

Respectfully submitted,

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APPENDIX

AN ACT to amend Section 3074 of the Mississippi code of 1906, and to enlarge the rights conferred therein upon materialmen, subcontractors, laborers and journeymen; to prohibit assignments, transfers, or other dispositions in derogation of the rights hereunder created; to make said rights concurrent; to provide that laborers, subcontractors, materialmen and journeymen shall be protected under contractor's bonds and may sue thereon.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That Section 3074 of the Mississippi code of 1906 be amended so as to read as follows:

"3074. (2714) *Subcontractors, laborers, etc., may bind the amount due the contractor by written notice.* (Laws 1904, chapter 153.) When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, or the amount due by him, to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, any such person, subcontractor, journeyman or laborer may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractors, journeymen and laborers, who might lawfully have given notice to said owner hereunder, and, if after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into

court to protect their rights, contest the demands of such contractor or master workmen and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen or materialmen, so far as known, parties to the suit (and any such party if not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be liable for costs; but if the owner, when sued, with the contractor or master workmen, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

Assignments by Contractor prohibited.

Sec. 2. No contractor or master workman except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors, journeymen, laborers, and materialmen as declared hereinbefore and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the subcontractors, journeymen, laborers and materialmen, as well as the owner. Provided, however, that this section

shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond conditioned as provided for in section 3 hereof.

Bond to pay for labor and materials furnished.

Sec. 3. That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein for which payment has not been made, shall have the rights to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee. If the full amount of the liability of the surety thereon is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the obligee, the remainder shall be distributed pro rata among said intervenors. The bond herein provided for may be made by any surety company authorized to do business in the state of Mississippi.

Bond—right of action—by whom.

Sec. 4. If no suit shall be brought by the obligee within six months from the completion and final settlement of said contract, then any person supplying therein labor or materials shall have a right of action on said bond for his

use and benefit against said contractors and the sureties thereon and to prosecute same to final judgment and execution, subject to the rights and demands of the owner.

Bond—suit on—when instituted.

Sec. 5. When suit is instituted by any such person on a bond, it shall not be commenced until after the complete performance of said contract, and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later; provided that if the contractor quits or abandons the contract before its completion suit may be instituted by any such person including the owner on said bond and shall be commenced within one year after such abandonment and not later. But said period for the limitation of the institution of said action shall not begin to run until the obligee shall have made said final settlement or determined said abandonment and published notice thereof in some newspaper in said county, or if there be none then in some newspaper having a general circulation therein.

Bond—suit on—only one action.

Sec. 6. When suit is so instituted by any person only one action shall be brought and any person entitled to sue may upon application intervene and be made a party to said suit; however, such intervention must occur within the time limited for such person to bring an original action.

Judgment on bond—funds insufficient—pro rata recovery.

Sec. 7. If the recovery on the bond should be inadequate to pay the full amount found due including amounts due the owner, judgment shall be given after the obligee is fully satisfied for all claims, demands, rights, and damages to each person pro rata of the amount of the recovery. The sureties on said bond may pay into court for distribution the full amount of their liability less any amount which may have been paid to the obligee by reason of the execution of said bond, upon so doing the surety will be relieved from further liability.

Process—sec. 3064 code amended. (Hemingway code sec. 2424.)

Sec. 8. To all suits instituted under the provisions of this act the parties interested shall be summoned as provided by section 3064 of code of 1906.

Sec. 9. That this act take effect and be in force from and after its passage.

Approved March 28, 1918.

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DEC 1
CHARLES

IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant,

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al.,

Appellees

No. 333

OCTOBER TERM, 1931

BRIEF FOR APPELLANT, IN RESPONSE TO THE MOTION TO DISMISS THE APPEAL, AND ON THE MOTION TO AMEND AND MAKE AETNA CASUALTY & SURETY COMPANY A PARTY.

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IN THE

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Appellant,

vs.

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Appellees.

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OCTOBER TERM, 1931

BRIEF FOR APPELLANT, IN RESPONSE TO THE MOTION TO DISMISS THE APPEAL, AND ON THE MOTION TO AMEND AND MAKE AETNA CASUALTY & SURETY COMPANY A PARTY.

---

1. *On the motion to dismiss because the surety on appeal in the Supreme Court of Mississippi is not joined as an appellant in this Court.*

We say, first, that this surety is neither a proper nor an indispensable party to the appeal; and, then, that if the Court should hold the surety to be a proper or necessary party, the surety has presented an application to be made party; that the

appellant and the surety on the bond to appeal to this Court have joined in a motion to amend the appeal by making the surety on appeal in the state court a party; and that this cures the omission.

The question whether a surety on appeal is a necessary party to an appeal sued out by his principal (in the absence of summons and severance) depends on his relation to the case and to the judgment appealed from.

Under the Mississippi statutes and practice the surety on appeal is not a party to the litigation. When the appellant fails to prosecute his appeal successfully, the court as a procedural matter includes in the judgment against the appellant a judgment against the surety on appeal. If for any reason the surety desires to challenge the correctness of his being included in the judgment, he must do so by some supplementary proceeding. He cannot appeal from the judgment as an original proposition. His liability on the judgment is contingent only.

Wilson v. City of Lexington, 153 Miss. 209; 119 So. 795.

Whether a judgment is such a joint judgment as that all parties against whom it is rendered must unite in the appeal depends not on the form of the judgment, but upon considerations of substance.

Hunrick v. Patrick, 119 U. S. 156; 30 L. ed. 396.

The New York, 104 Fed. 561.

Love v. Export Storage Co., 143 Fed. 1, 11.

Clarke v. Boysen, 39 F. (2d) 800, 821.

The nature of judgments rendered in the State of Mississippi and the relations of parties thereto is a matter of local law as to

which the decisions of the highest courts of that State are controlling. (Compare *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84, 90; 43 L. ed. 623, 625). The Supreme Court of Mississippi has held (*Wilson v. City of Lexington*, 153 Miss. 209; 119 So. 795) that though an intermediate appellate court includes the surety on the appeal to that court in the judgment it renders against the appellant, that the surety on this first appeal is not a necessary party to a further appeal of the case to a higher court. The rule of joinder on appeal is the same in that State as it is in this Court, with the exception of the manner in which summons and severance is had as to a non-joining party. Hence, when the highest court of that State holds that a surety on appeal, against whom judgment has been rendered along with his principal, in pursuance of a rule of practice in that State, is not a necessary party to a further appeal by his principal to a higher court, it is a construction of the effect of judgments in that State—a construction that the relations of the principal appellant and his surety to the judgment are not joint but are severable; and that the relation of the surety to the judgment is not absolute, as it appears on the face of it to be, but is contingent only. The earlier case of *Thomas v. Wyatt*, 17 Miss. 308, cited by opposing counsel, was overruled in *Wilson v. Lexington*, supra.

"The scope and effect of a state judgment is peculiarly a question of State law."—*Kenney v. Craven*, 215 U. S. 125, 130; 54 L. ed. 122.

The U. S. Court of Appeals of the 5th Circuit, in which Mississippi is included, having before it the question of joinder on appeal, has also held, in a case involving principal and surety, that "judgments and decrees under the law of Mississippi are joint and several, and not merely joint."

National Surety Co. v. LeFlore County, 262 Fed. 325.

In *National Surety Co. v. Austin Machinery Co.*, 35 F. (2d) 842, 845, the Court of Appeals of the 6th Circuit, having before it for consideration a judgment rendered in a state court in Mississippi, held that under the laws of that State, judgments against principal and surety are not joint but are several.

In Mississippi the common-law rule as to joint contracts has been abolished by statute, so that all liabilities, by contracts, express or implied, including judgments are now several.

J. B. White's Garage v. Boyd, 149 Miss. 383; 115 So. 334.

Mississippi Code 1930, §§ 2027, 2028.

This is peculiarly so as to bonds on appeal; since all appellants do not have to join in the appeal bond, and judgment on appeal may be entered against the surety, though his immediate principal be held not liable, if liability is adjudged against any of the other appellants—thus showing a complete severability of liability.

Mississippi Code (1930) § 37.

Wise v. Cobb, 135 Miss. 673; 100 So. 189.

A joint judgment, if we look to common-law definition, is one in which if either party pays it off he is entitled to contribution against the others; and in a judgment against one as principal and another as surety no contribution ever exists. The principal, if he pays, cannot recover anything from the surety; and, if the surety pays, he can recover the entire amount from the principal.

However, whatever may be the rule as to joinder on appeal as to cases where principal and surety are sued in the same action, or as to cases where the sureties on bonds of certain

kinds, given pendente lite, have the right to be heard before judgment is rendered against them, neither reason nor precedent supports the proposition, that where, under statute or the rules of court, judgment is automatically and without further hearing rendered against the surety on appeal or similar bonds, the surety is a necessary party to an appeal from that judgment, where the appeal is solely on the merits of the controversy.

Perhaps the best reasoned case on this subject is that of *The New York*, 104 Fed. 561, in the U. S. Court of Appeals of the 6th Circuit (Judges Lurton, Day and Severens presiding; and all participating). The opinion is by Judge Lurton. The motion to dismiss the appeal was on the ground that the surety (on an admiralty bond) against which judgment was rendered automatically under the rule of court, was not joined. The motion to dismiss was overruled.

Judge Lurton first states the reason for the rule requiring joinder in appeal thus:

> "The principal is that the same controversy cannot come up in fragments. To make the doctrine applicable the *controversy* must be one to which there are two or more parties jointly interested as parties to the same *litigation*." (Italics ours).

It is pointed out that though (as in the case at bar) the judgment on its face is against the surety as well as against the appellant, that the surety, which in that case (as in the case at bar) was automatically included in the decree because of its obligation that the principal would comply with the judgment of the Court, was not a party to the controversy involved in the case; that that case (as is true of the case at bar) did not involve any question touching the obligation of the surety or in any way involving the terms of the stipulation of the bond.

Ex parte *Sawyers*, 21 Wall. 236; 22 L. ed. 617, is cited in the opinion and is distinguished by the fact that it involved the liabilities of the sureties and that it arose upon a rule issued against them.

In the course of the opinion, it is pointed out that the exact question arose in the Fourth Circuit in the case of *The Glide*, 72 Fed. 200; and that, on sound reasoning, it was held that the sureties were not necessary parties to the appeal; that their interests were merged into those of the appellant and represented by him.

An analysis was made of the case of *Estis v. Trabue*, 128 U. S. 225; 32 L. ed. 437; attention being called to the fact that the bond there given was a different kind of bond.

The learned judge further remarked very pointedly:

> "We fail to see any greater reason for regarding the stipulators, sureties in such a bond, as necessary parties to an appeal than there is for regarding the sureties in a cost bond as parties to the controversy."

The Court adds:

> "Undoubtedly, if the suit is upon a bond, and the judgment is against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject-matter of the litigation. To this class of cases the case of *Estis v. Trabue* belongs."

In thus distinguishing *Estis v. Trabue*, Judge Lurton doubtless had in mind the fact that the case arose in Mississippi, and while sureties on a claimant's forthcoming bond in attachment in that State are not allowed to participate in the litigation prior

to the time when liability is established against the claimant, still before judgment is to be renedered against them they are given opportunity to show in defense any reason they have why judgment should not be renedered on the bond.

See *Atkinson v. Faxworth*, 53 Miss. 733.

Atkinson v. Faxworth, 53 Miss. 741.

The judgment appealed from in *Estis v. Trabue* was, as Judge Lurton points out, a judgment in a suit, which was in substance a suit on the bond itself.

From the final decision of the Court of Appeals in the case of *The New York*, supra, (108 Fed. 102) the case went to the Supreme Court; and the Court rendered judgment affirming the judgment of the Court of Appeals. It is true that in the Supreme Court no notice is taken of the lower court's ruling on the motion to dismiss; but, since the point is one which, if well taken, is to be noticed by the Court on its own motion, the action of the Supreme Court in taking jurisdiction and deciding the case on its merits is indirect authority and physical precedent sustaining the ruling of the Court of Appeals on the question. This case on appeal from this decision of the Court of Appeals is found in 189 U. S. 363, 47 L. ed. 854 (sub nom. The Conemaugh in the official report and sub nom. *Union Steamboat Co. v. Erie & Western Transportation Co.*, in the L. ed.) Mr. Justice Holmes in *Erie R. Co. v. Erie & W. Transportation Co.*, 204 U. S. 220, 224, 51 L. ed. 450, 453, gives the history of the litigation including the ruling on the motion to dismiss.

In the case of *Columbia River Packers Association v. McGowan*,, 217 Fed. 196, by the Court of Appeals of the 9th Circuit, it is held that sureties on an injunction bond need not be joined in an appeal to the higher court from a judgment in

which they were included along with their prinicpal. There is a full discussion and analysis of the cases on the subject.

In the case of *Lamon v. Spear Hardware Co.*, 190 Fed. 734, (relied on by opposing counsel) the Court of Appeals of the 8th Circuit did dismiss an appeal because sureties on an intermediate appeal, who were included in the judgment, were not joined, but, later, the order of dismissal was vacated, and on reargument it was held (198 Fed. 453) that they were not necessary parties; and the motion to dismiss was denied. On the rehearing it is pointed out that the liability of the sureties arose on the appeal bond, while the liability of the appellant arose upon the original cause of action and that, therefore, though the judgment was apparently joint, it was not in fact so.

In *Hart v. Wiltse*, 16 F. (2d) 838, (U. S. C. A. 1st Circuit) it was held that one who was included in the final decree because of a stipulation filed by him to abide the decree rendered in the cause, was not a necessary party to an appeal prosecuted from that decree by another defendant who had litigated the question and against whom the same decree had been rendered.

One of the reasons given in *The Glide* (72 Fed. 200) as to why the sureties are not necessary parties to the appeal—that they are represented by their principal—is but a corollary of the propositions developed and announced in *Pease v. Rathburn-Jones Engineering Co.*, 243 U. S. 273; 61 L. ed. 715—that the sureties on appeal and similar bonds are only quasi-parties; that their relation to the case is not to conduct, control or participate in the litigation, but only to abide the result of it as conducted by their principals; that inclusion of them in the judgment or decree does not come as the result of judicial determination of issues of law or of fact, but merely as a matter of special contract; that no matter how many appeals are subsequently taken in the case, their contractual relation to it is not changed, they merely abide the final result, whatever it is.

This is in accord with what is said in *Babbitt v. Shields,* 101 U. S. 7; 25 L. ed. 820.

> "Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court, nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction but the reversal of the judgment in some court having jurisdiction to correct the alleged error."

Since such sureties, so related to the controversy, can neither assign error nor release error as to anything occurring on the trial of the case or involved in the judicial determination of the issues of which the judgment is the net embodiment, what good reason can exist for joining them in the appeal?

A surety not interested in the controversy on the merits cannot appeal, though included in the judgment.

Davis v. Preston, 280 U. S. 406; 74 L. ed. 514.

Suppose such a surety were asked to join in appeal and consented to do so, what error could he assign? What exception could he rely on?

If, as is said in *Ex parte Chetwood,* 165 U. S. 443, 461; 41 L. ed. 782, 788, "according to the practice in this Court, a writ of error (now appeal) has been treated rather as a continuation of the original litigation than the commencement of a new action," (citing *Nations v. Johnson,* 65 U. S. 195, 205; 16 L.

ed. 628, and *Cohens v. Virginia,* 19 U. S. 410, 5 L. ed. 292) how can one, whose function in the case is not to conduct litigation, but merely to abide the result of litigation, prosecute the appeal or join in prosecuting it or in shaping and controlling the litigation on appeal?

In the *Glide* case (72 Fed. 200) it is said that the surety need not be joined in the further appeal, because his interests are represented by his principal. In *Clinchfield Fuel Co. v. Titus* (4th Circuit) 226 Fed. 574, the Court refused to dismiss appeal for the non-joinder of certain persons alleged to be necessary appellants, on the ground that another person representative of their interest had been joined as an appellant.

On these and other similar considerations it would seem that, with the possible exception of cases where, under the practice in the particular court, opportunity to be heard is given the surety before judgment is rendered against him and some justiciable question has thus arisen as to the surety's liability, a surety on appeal would be neither a proper nor a necessary party to a further appeal.

An examination of the final judgment in this case (R. 75) shows that it consists of two distinct parts; the first wherein the judgment of the lower court is reversed as to Williamson Grier Company and affirmed against appellant as to other appelles. It is in this that the former judgment, on which the constitutional questions really depend—the judgment overruling the demurrer —is made final enough to support an appeal. It is from this judgment of affirmance, as it relates back to the prior judgment on the demurrer, that the appellant is now appealing. It is this part of the judgment in which inhere the constitutional questions which give this Court jurisdiction. Following the judgment of affirmance, the Court proceeds, as an administrative matter, to compute the principal, the interest, the damages and the

costs to which the respective parties are entitled. All this computation could have been delayed or could have been left to the lower court without robbing the judgment of its finality. It is only in this part of the judgment that the surety is mentioned. In this part of the judgment none of the appealable questions are involved. The separability of the judgment perhaps more clearly appears, when we realize that the case was ready for appeal by the present appellant the moment the judgment was affirmed; and if the Court had stopped there the surety certainly would not have been a necessary or proper party to the appeal; and that the Court had to end the controversy as to which the appellant was a party by a judgment of affirmance before it was authorized to render any judgment against the surety on the bond.

But even if the surety in such a case be a proper party to join with his principal in appealing to a higher court, he is not a necessary party, since the judgment, as against each, is based on separate considerations—the judgment against the principal being the result of the decision of justiciable controversies between him and the appellees; the judgment against the surety being the result of his stipulations in the bond, thus creating such a separability in the judgment as to authorize his principal to prosecute his separate appeal.

On reflection it may be seen that the surety's relation to the case and to the judgment is very analogous to the position of a co-defendant against whom a decree pro confesso or a default has been taken where the other defendant defends. The non-answering defendant merely stands by without right to participate in the trial, or to object, except or assign error on what is done on the trial, but if the answering defendant loses the case, is included in the judgment against him. It is held that in appealing from such a judgment the defendant who litigated need not join the defaulting co-defendants included in the same judgment.

Winters v. United States, 207 U. S. 564, 52 L. ed. 340.

Federal Intermediate Credit Bank v. L'Herrisson, 33 F. (2d) 841.

Clarke v. Boysen, 39 F. (2d) 800, 820.

On the point that surety on intermediate appeal is not necessary party to subsequent appeal we also cite *Evans v. Cheyenne Cement Stone etc. Co.*, 20 Wyo. 188; 122 Pac. 588, not because it is in any wise binding on this Court, but because of the excellence of reasoning on which it is based and because of the discussion of the cases in it.

However, if the Court should be of the opinion that the Aetna Casualty & Surety Company, which was the surety on the appeal to the Supreme Court of Mississippi, is a necessary or proper party, motions have been filed by it and by the appellant to make it a party; and the surety on the appeal to this Court has consented that its appeal bond be amended accordingly.

The case of *Inland & Seaboard Coasting Co. v. Tolson*, most frequently cited as authority for adding a plaintiff in error or appellant by amendment, is reported in 136 U. S. 572, and in 34 L. ed. 539. As may be seen by reference to the facts stated in the official report of the case, the precise question presented here was the subject of the ruling there. Upon the affirmance of trial court's judgment by the lower appellate tribunal, judgment was entered, under rule of court, against the appellant and his sureties on the appeal bond. The appellant appealed to the Supreme Court and did not join his sureties in the writ of error. Motion was made to dismiss on ground of this non-joinder and was granted. Later during the same term a rehearing was al-

lowed. At this hearing (the time for appeal having expired) the sureties asked that the writ of error be amended so as to make them parties. Over strenuous objection of the defendant in error, the order of dismissal was rescinded and the motion to dismiss was ~~granted~~ denied. The motion to amend the writ of error by the inclusion of the sureties was also granted.

The Court of Appeals of the 5th Circuit in the case of *The Mary B. Curtis*, 250 Fed. 9, dealing with a motion to dismiss because claimant's sureties on an admiralty bond had not been joined in the appeal, deemed itself bound by an old precedent in the same court, to hold that the sureties should be joined; but, the sureties having voluntarily appeared and asked that they be made parties, though the time for appeal had expired, the Court made a comprehensive review of the authorities and granted the motion to make the sureties parties and denied the motion to dismiss.

See also the case of *The Seguranca (Dixon v. Howe)*, 250 Fed. 19.

Such an amendment, making admiralty sureties parties to the appeal, to obviate motion to dismiss for non-joinder, was allowed by the Court of Appeals of 8th Circuit in *The City of Naples*, 69 Fed. 794.

In *Hart v. Wiltse*, 16 F. (2d) 838, it was held that the making of necessary parties to the appeal within the time for appeal was not jurisdictional and that necessary parties could be added after the time for appeal had expired. See also *Rininger v. Puget Sound Electric Ry.*, 220 Fed. 419; *Hill v. Western Electric Co.*, 214 Fed. 243.

In the recent case of *Kelly v. Allen*, 49 F. (2d) 876, the Court of Appeals of the 9th Circuit held that the voluntary ap-

pearance in the Court of the omitted co-appellant prevented granting of motion to dismiss for the non-joinder.

II. *Pleadings and Proof Present Constitutional Question.*

We are not quite sure that we understand what point the appellees are making, in this division of their motion.

If the point be that the pleadings before the Court do not disclose a federal question with requisite certainty, it seems necessary only to call to the attention of the Court that the constitutional question involved in this case arises by direct attack on the constitutionality of the statute; this Court's jurisdiction being invoked under Division (a) of 28 U. S. C. A. § 344 (Judicial Code § 237) and not under Division (b) of that section. The demurrer in this case certainly drew in question the validity of the state statute on the ground of its being repugnant to the U. S. Constitution; and the decision of the state court was certainly in favor of its validity; and that gives jurisdiction—the question not being frivolous.

If the point be that the entire record is not here, it is covered by Rule 10 (former Rule 9).

By an inspection of the printed transcript it will be seen that the appellant served and filed its praecipe for such parts of the record as were material to the constitutional questions it was making. The appellees, or some of them, filed their praecipe calling for additional record, the materiality of which we do not see.

If the appellant had specified and caused to be sent up the entire record, consisting of seven large volumes, this Court would very properly have taxed it with the great cost involved. *Texas & Pacific Ry. Co. v. Leatherwood*, 250 U. S. 478; 63 L. ed. 1096.

The constitutional attack having been made by demurrer to the original bill, and the rights of all parties being necessarily dependent on the validity of the statute on which the bill is based, and under the provisions of which the action was brought, it is unnecessary that the whole record be before this Court, which is concerned only with the constitutional questions.

III. *On the Point that the Appeal Involves No Federal Question.*

The question of the jurisdiction of this Court to pass on the questions the appellant has made by its assignments of error has been fully discussed in the jurisdictional statement filed under paragraph 1 of Rule 12, and in the briefs on the case generally which have already been filed.

However, since opposing counsel are relying on cases such as *Ramsey & Gatlin Construction Co. v. Vincennes Bridge Co.*, 283 U. S. 796; 75 L. ed. 1420, and making the point that where a state court has held that, under its statutes, a bond or other contract is to be given a certain construction and effect, the federal courts are bound by that construction, we wish to reply that manifestly this rule does not militate against the party, whose contract has been construed as being under the statute, from attacking the statute, as thus construed and applied, as being repugnant to the Constitution of the United States.

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction, as to which there is a distinct and timely insistence that if so applied the statute was void under the Federal

Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable."

Fiske v. Kansas, 274 U. S. 380; 71 L. ed. 1108.

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
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Attorneys for Appellant.

Of Counsel.

FILE COPY

FILED
DEC 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Appellant,

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al.,

Appellees

No. 333

OCTOBER TERM, 1931

BRIEF ON BEHALF OF APPELLANT IN REPLY TO MOTION OF NATCHEZ INVESTMENT COMPANY TO DISMISS

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
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The alleged non-federal question, being subordinate to and dependent on the constitutionality of the statute, its presence in the record, does not defeat jurisdiction..... 1

CASES CITED

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Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655; 56 L. ed. 595..... 2

Missouri Pacific R. Co. v. Larabee, 234 U. S. 459; 58 L. ed. 1398 2

(N. B. The Court, by order, having hitherto postponed consideration of jurisdictional questions, till argument on the merits, counsel have briefed these questions in their brief on the merits. So far as these questions are involved in these motions to dismiss or affirm, arguments and citations are not repeated in present briefs; it being assumed that the Justices will have before them the briefs on the merits in considering these motions.)

BRIEF.

After counsel for appellants had printed and sent for filing their brief on the merits and their brief on the motion of appellees to dismiss, they were served with another motion to dismiss by Natchez Investment Company, for the use of Engle and Laub, to whom counsel fees were awarded. Hence, this additional brief.

Even if it were conceded that the allowance of the attorneys' fees is not involved in the federal question, still this would be no ground for dismissal. The jurisdiction of the Supreme Court to review the final decree of the highest court of the State of Mississippi having attached because in the suit in which that decree was rendered there was drawn in question the validity of a statute of that State, on the ground of its being repugnant to the Constitution of the United States, it has, under Judicial Code § 127, U. S. C. § 344, the power to reverse, modify or

affirm the decree or to remand the cause for further proceedings consistent with the opinion of the Supreme Court.

Missouri Pacific R. Co. v. Larabee, 234 U. S. 459; 58 L. ed. 1398.

In other words, where the non-federal question is not broad enough to constitute a basis for the entire decree, the court has jurisdiction.

Where a non-federal question or a question of fact is so interwoven with the federal question as that the latter cannot be decided fully without a consideration of the former, the Court will consider both.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655; 56 L. ed. 595.

Abie State Bank v. Bryan, 282 U. S. 765; 75 L. ed. 690.

The liability for, and the amount of the attorneys' fees in this case necessarily depended on the liability of the appellant to the materialmen; and that liability was absolutely dependent on the constitutionality of the attacked statute.

The liability under the contract, to which counsel refer (R. 17) for attorneys' fees for filing the bill, arose only in the event it became *necessary* to institute "concursus proceedings"; and, in the nature of things, such a proceeding could not become necessary unless the bond ran in favor of the materialmen.

W. CALVIN WELLS,
L. BARRETT JONES,
CHARLES S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,
Attorneys for Appellant

Arthur G. Powell
Of Counsel

FILE COPY.

FILED
DEC 4 1931

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

Come Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, doing business as Bunn Electric Co., Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee

Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Co., C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co., Appellees in intervention, and severally, though joining herein to avoid prolixity, move to dismiss as to each of them, or to affirm for want of substantial Federal question, and for reasons, assign:

I.

The judgments in the Supreme Court of Mississippi in favor of Appellees (Tr., 74-83) were several judgments rendered, jointly against *Hartford Accident & Indemnity Company* and *Ætna Casualty & Surety Company,* surety on the appeal bond to that Court. No appeal has been taken by Ætna Casualty & Surety Company, and hence, there is no jurisdiction at the instance of Hartford Accident & Indemnity Company alone.

II.

But if said appeal were properly had, which movants deny, then thereunder, as to these movants, dismissal must be had because there are no pleadings and/or proof in the transcript whereunder the judgment of the Supreme Court of Mississippi may be reversed.

III.

If said appeal were properly had, and if the Court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only

an interpretation of a local contract in so far as these Appellees are concerned.

WHEREFORE these Appellees, having but just received the printed transcript, make this motion, having specifically reserved their rights so thus to do (Tr., 102).

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees,
By GARNER W. GREEN.

Of Counsel:
BRADLEY, BALDWIN, ALL
& WHITE.

To Messrs. Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, counsel for appellant:

Please take notice that the foregoing motion to dismiss or affirm, with the annexed brief, will be presented to the Supreme Court of the United States upon the fourth day of December, 1931, or as soon thereafter as may be, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.

Service of the foregoing is hereby acknowledged this November 30, 1931.

ARTHUR G. POWELL,
W. CALVIN WELLS,
L. BARRETT JONES,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

BRIEF AND ARGUMENT.

General Statement.

Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, doing business as Bunn Electric Co.; Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, doing business as

Schultz Cabinet Works; Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, copartners, doing business as Natchez Brick Co.; C. R. Burkett, doing business as Burkett Sheet Metal Works; W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co. (herein called "Appellees"), move to dismiss or affirm, having specifically reserved this right (Tr., 102), wherein appearance was entered "without recognizing that any appeal has been validly made and without prejudice to right (to move) to dismiss."

Appellees were made defendants to the original bill (Tr., 1) filed by the Natchez Investment Company—not the Hartford Accident & Indemnity Company. None of the pleadings, nor any of the evidence, whereon the decree (Tr., 57) in favor of Appellees, intervenors in the Chancery Court, was rendered, appear, nor does that whereon the judgment in the Supreme Court (Tr., 74), the form of the judgment there being (Tr., 80):

> "Enochs Lumber & Mfg. Co., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Ætna Casualty & Surety Company, surety in the appeal bond, the sum of ten thousand and three and thirty-eight one hundredths dollars, the amount of the decree in the court below, together with the further sum of five hundred and sixteen one-hundredths dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 per centum per annum."

The judgments in favor of other appellees are the same (Tr., 74-83).

The costs were taxed against the Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company in so far as these Appellees are concerned.

The Supreme Court of Mississippi heard the cause first upon appeal of the Hartford Accident & Indemnity Company to settle principles (Tr., 46); next, upon the appeal on the merits (Tr., 67); and, finally, upon a suggestion of error (Tr. 86).

Point I.

There being a joint judgment (Tr., 74-83) against Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, no jurisdiction of an appeal by Hartford Accident & Indemnity Company alone.

In *Hardee* v. *Wilson,* 146 U. S. 180, 36 L. Ed. 933, Mr. Justice Shires declared:

> "Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. *Owings* v. *Kincannon,* 32 U. S. 7 Pet. 399 (8:727); *Mussina* v. *Cavazos,* 73 U. S. 6 Wall. 355 (18:810)."

Hughes Federal Practise, Sections 5430, 6153; *Maytin* v. *Vela,* 216 U. S. 598, 54 L. Ed. 623; *Babcock* v. *Norton,* 5 Fed. (2d), 154, Certiorari denied, 45 S. Ct. Rep. 509, 69 L. Ed. 1158, 268 U. S. 688; *Inglehart* v. *Stansbury,* 151 U. S. 71, 38 L. Ed. 563; *Davis* v. *The Mercantile Trust Co.,* 152 U. S. 588, 38 L. Ed. 563; *Sipperly* v. *Smith,* 155 U. S. 86, 39 L. Ed. 79; *Downing*

v. *McCartney*, 76 U. S. 394, 19 L. Ed. 757; *Winters* v. *U. S.*, 207 U. S. 564, 52 L. Ed. 340. The claim of each Appellee—materialman—is severally and separately determinable in this Court. *Seaver* v. *Bigelow*, 5 Wall., 208 (72 U. S., 18 L. Ed. 595); *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. Ed. 329.

Point II.

Pleadings and proof presenting a Federal question condition jurisdiction here.

Appellees as well as Appellant were both defendants to the original bill (Tr., 1). Under State practise, as intervenors, Appellees severally sued Appellant, Hartford Accident & Indemnity Company, by cross-bill, which finally resulted in the judgment (Tr., 57) in the Chancery Court (Tr., 74, 80-81); in the Supreme Court. The three opinions rendered by the Supreme Court appear, Transcript, 46, 67, 86.

In this Court there is neither pleading nor proof presenting any Federal question within Section 237 of the Judicial Code as amended, Section 344 U. S. Code Annotated.

Jurisdiction here to review is not general, but limited to specific instances where Federal rights were set up in the State court and denied. *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 53 L. Ed. 417; *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112, 46 L. Ed. 829.

Initially, under *Williams* v. *Norris*, 12 Wheat. 117, 6 L. Ed. 571; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. Ed. 733; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. Ed. 317,

and the rules then in effect, the opinion of the State court could not be resorted to, to show a Federal question; but in *San Jose Land, etc., Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 180, 47 L. Ed. 765, it was said:

> "Under the rule of this Court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed', that it (Federal question) was fully considered in the opinion of the court and ruled against the plaintiff in error."

Here, in an intervention, where neither cross-bill, answer nor proof upon which the decree was rendered, appear, this Court is without a record upon which to reverse that done below, as to each several appellee. *Seaver* v. *Bigelow*, 5 Wall., 208 (72 U. S., 18 L. Ed. 595); *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. Ed. 329. True, in intervention the practise is not clearly prescribed and thereasto there is confusion. *Hughes Federal Practise*, Sec. 3227. But no Federal question is here presented by the record as against these Appellees.

In *Suydam* v. *Williamson*, 20 How. 427, 15 L. Ed. 980, it is said:

> "When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the prac-

tice of such courts, he must be content to abide the consequences of his own neglect."

POINT III.

If said appeal were properly had, and if the Court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as these Appellees are concerned.

Appellant is contractually liable to Appellees and the Mississippi Supreme Court so held, interpreting the Standard Form of Agreement between contractors and owners issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment.

The agreement being in writing and annexed, controlled the averments of the pleader as to the rights thereunder arising. *McNeill* v. *Lee,* 79 Miss. 455; *Hanover National Bank* v. *Montgomery,* 79 Miss. 443.

Under *Union Indemnity Company* v. *Acme Blow Pipe Co.,* 117 So. 251, 150 Miss. 332, "The bond was part of the contract and the contract was made part of the bond," Mississippi laws controlling. *Ramsey & Gatlin Construction Co. et al.* v. *Vincennes Bridge Co.,* 283 U. S. 796, 75 L. Ed. 1420.

Under Article 30, quoted at length in opinion Supreme Court (Tr., 47) on first appeal, and in the opinion on the Suggestion of Error (Tr., 87):

> "It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include

> within his bid to furnish a bond *in the sum and conditioned as the law of the State of Mississippi requires,* in a surety company satisfactory to the Owner or Architect. * * * The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building *according to the laws of the State of Mississippi.*"

As was said in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & M. Co.,* 243 U. S. 95, 61 L. Ed. 616:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. New York, L. E. & W. R. Co. *v.* Estill, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Especially when, under Article 3 (Tr., 11), the amount to be paid the contractor was the precise amount of the bond (Tr., 18)—$316,822.00, and the Statute of

Mississippi (Sec. 2276, Code 1930, then in effect) provides:

> "When any contractor * * * entering into a formal contract with any person * * * for the construction of any building * * * shall enter into a bond with such person guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations *that such contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,*".

if the owner is to be free from liens as stated by the Mississippi Supreme Court (Tr., 55). And that held by the Supreme Court of Mississippi was that this bond so thus by contract did, the Court saying (Tr., 55):

> "In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear *that the parties intended to execute the bond provided for and required by the contract between the owner and contractor*, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a bond as was called for

by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor, and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted.

"This brings the case within the decision rendered in the case of U. S. F. & G. Co. *v.* Parsons, *et al.*, 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the sub-contractors, journeymen, laborers and materialmen."

This holding as to the intention of the parties under the contract is a local question. *Ramsey & Gatlin, etc. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420. Especially, as by Article 4 (Tr., 11) of the contract, which allows payment on account on or about the 1st and 15th of each month, based on contractor's prices for labor and material, thereby each payment to be made by the owner to the contractor was conditioned by the precedent integration into the structure of materials or labor belonging to a third party.

As declared in *Lockland Lumber Co.* v. *Robinson*, 157 N. E. 376, 116 Ohio St. 725, materialmen's lien stat-

utes do not create substantive rights but are remedial, vouchsafing additional means for enforcing payment of a debt.

Article 5 (Tr., 12) specifically provides:

> "Before issuance of final certificate The Contractor *shall submit evidence satisfactory to the Architect that all pay rolls, material bills and other indebtedness connected with the work have been paid.*"

Article 6 makes "the general conditions * * * specifications and drawings, together with this agreement, form the contract, as if hereto attached or herein repeated" (Tr., 12).

Again (Tr., 14):

> "*The law of the place of building shall govern the construction of this contract.*"
>
> "The contract documents are complementary and what is called for by *any one shall be* as binding as if *called for by all.*"
>
> "Article 9. *Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, water, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.*"

Article 22, which was not brought up in this transcript, but was in the State transcript, page 30, provided: "If he (the contractor) should fail to make prompt payment to subcontractors or for material or labor", then the owner might take possession and complete.

Likewise, under Article 24, the Contractor had to submit to the architect an application for each payment, and if required, receipts showing payment for materials and labor (Supreme Court Miss., Tr., 31).

Likewise, Article 24, not embraced within this transcript, further provided:

> "If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional, upon submission by the Contractor of bill of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest" (Miss. Supreme Court, Tr., 32).

> "Article 30. *The owner shall have the right prior* to the signing of the contract, to require the contractor *to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve*" (Tr., 15).

> "Article 32. Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall have delivered to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the release and receipts include all the labor and material for which a lien could be filed" (Tr., 15).

> "Article 30 (Tr., 16). *It shall be the obligation of every contractor* and subcontractor *estimat-*

ing upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner or architect, *contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.*

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract, and the institution of concursus proceedings, if such proceedings become necessary.

*"Obligation of Bondsmen: The Contractor's bondsmen shall obligate themselves to all the terms and convenants of these specifications, and of the contract covering the work executed hereunder * * * "*

"The sureties of the various contractors shall be, and are hereby declared and acknowledge themselves to be, bound to the owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing."

See *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332; *Commercial Bank of Magee* v. *Evans*, 145 Miss. 643, 112 So. 482; *U. S. F. & G. Co.* v. *Parsons*, 147 Miss. 335, 112 So. 469, 53 A. L. R. 88.

We thus have a specific obligation to include in Burkes', the contractor's, bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder." So, when the Indemnity Company made this obligation, a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and in solido, with the contractors of the fulfillment of the terms of the foregoing" (Tr., 17). That which went before declares the absolute obligation to pay all persons for materials (Art. 9, Tr., 14). By the execution of this bond, appellant accepted this obligation. Therefore, it received a premium computed upon the basis of the law of the State of Mississippi, requiring that appellant execute such an obligation, so securing those furnishing labor and materials, and having so thus been compelled to compute its premium as to include this obligation to pay materialmen and laborers in accordance with the law of Mississippi, it is not competent to pay losses on another and different basis, it being declared in *Insurance Company* v. *Shlenker,* 80 Miss. 667, 32 So. 155:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The

very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

So that, if it were not a fact that the Indemnity Company was not obligated to make payments to materialmen, then this provision of this bond is meaningless. It connotes responsibility for the payment which might impute injury to the surety, if certain things were left undone. But the connotation of responsibility is inescapable, Sec. 6, *et seq.* especially enumerates those things not covered by the bond. In short, if the bond is not to make good the quality of work, nor of efficiency, nor the maintenance, nor for the payment of certain compensation for injuries, why enumerate, and especially why exclude the obligation to pay for labor and material. Note especially Sec. 7, whereunder the obligation is especially declared. This bond must be construed as a part of the plans and specifications, which are by it referred to, and by it made a portion of its obligation. Wheresoever made a portion of this obligation, there is in the bond those certain and specified provisions, that "the contractor shall provide and pay for all the materials, labor * * *" (Tr., 14).

It so thus being, thereby Appellant conclusively must be presumed to have meant what it said, and its contract is obligatory, and operative, and materialmen may sue thereon. *Lee* v. *Newman,* 55 Miss. 374, as modified in *Washington* v. *Soria,* 73 Miss., 675. No other interpretation can hereon be placed.

Therefore, that done by the Mississippi Court was the decision of a local question under a contract the

interpretation of which by the Supreme Court is here controlling. *Ramsey & Gatlin Const. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420.

Compare *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 850 (Florida 1931), where it was declared:

> "The record discloses that the bond was in the form prescribed by the American Institute of Architects, which has been examined in several jurisdictions and construed as being sufficient to protect subcontractors not formal parties to it or the contract secured by it. American Surety Company of New York *v.* DeWald, 30 Ga. App. 606, 118 S. E. 703, text 705; Hartford Accident & Indemnity Company *v.* W. & J. Knox Net & Twine Company, 150 Md. 40, 132 A. 261; Pittsburgh Plate Glass Company, Inc., *v.* Fidelity & Deposit Company of Maryland, 193 N. C. 769, 138 S. E. 143; Mansfield Lumber Company *v.* National Surety Company, 176 Ark. 1035, 5. S. W. (2d) 294; Byram Lumber & Supply Company *v.* Page *et al.*, 109 Conn. 256, 146 A. 293; Fidelity & Deposit Company of Baltimore, Maryland, *v.* Rainer, 220 Ala. 262, 125 So. 55."

It is true that the form here involved has been somewhat modified, but the Supreme Court of Mississippi held that the modification was not effectual to change the obligation from that therein declared.

Compare *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Pittsburgh Plate Glass Co. Inc.*, v. *Fidelity & Deposit Co. of Maryland*, 193 N. C. 769, 138 S. E. 143; *Aetna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (2d) (Ky.

1931), 234; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543, 163 Wis. 41; *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kans. 1917), 163 Pac. 1076, 100 Kans. 28; *Aetna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.* (Ark. 1929), 20 S. W. (2d), 180; *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d), 458; *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. 256, 146 A. 293 (Conn. 1929); *Hartford Accident & Indemnity Co.* v. *W. & J. Knox Net & Twine Co.* (Md. 1926), 150 Md. 40, 132 A. 261; *American Surety Co. of New York* v. *DeWald* (Ga. 1923), 30 Ga. App. 606, 118 S. E. 703, text 705.

That for the contrary ruling as a matter of interpretation, compare *Central Supply Co.* v. *U. S. F. & G. Co.,* 173 N. E. (Mass. 1930), 697; *Maryland Casualty Co.* v. *Johnson,* 15 F. (2d) 253.

This statute of Mississippi is modeled upon the statute of the United States dealing with public contracts, which has been sustained and construed in *United States* v. *American Surety Co.,* 200 U. S. 200, 50 L. Ed. 441; *Mankin* v. *United States,* 215 U. S. 536, 54 L. Ed. 316; *Illinois Surety Co.* v. *John Davis Company;* 244 U. S. 375, 61 L. Ed. 1206.

It was perfectly competent for the Mississippi Court, as a matter of intention to segregate this bond into two obligations, one in favor of the owner, the other in favor of the materialmen, the contract so thus reading. *United States* v. *National Surety Co.,* 34 C. C. A., 528, 92 Fed. 551; *Dewey* v. *State,* 91 Ind. 173; *Doll* v. *Crume,* 41 Neb. 655, 59 N. W. 806; *Steffes* v. *Lemke,* 40 Minn. 97; *Kansas City Hydraulic Press Brick Co.*

v. *Natl. Surety Co.* (Mo. 1906), 149 Fed. 507; *U. S. F. & G. Co.* v. *Omaha,* 116 Fed. 145; *Pingrey on Suretyship and Guaranty,* Sec. 112, p. 139.

Further, this contract by a paid surety is to be most favorably interpreted for Appellees. *American Life & Accident Ins. Co.* v. *Nirdlinger,* 113 Miss. 74, 73 So. 875; *United States Fidelity & Guaranty Co.* v. *Citizens State Bank of Moorhead,* 116 So. 608, 150 Miss. 386.

With Appellant in the business for profit it unquestionably computed the premium upon the basis of this imposition and as said in *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. (1929) 256, 146 A. 293:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."
>
> *U. S. F. & G. Co.* v. *United States,* 191 U. S. 416, 24 S. Ct. 142, 48 L. ed. 242, 246.

The Indemnity Company, doing business in Mississippi where all such obligations had been specifically sitused (sec. 5818, Hemingway's Code 1927, quoted in *Fidelity Mutual Ins. Co.* v. *Miazza,* 93 Miss. 18, 46 So. 817), agree that it would be bound in manner and form

as by the law of the State of Mississippi required, and that its bond was to be "in the sum and conditioned as the law of the State of Mississippi requires" (Tr. 17). The requirements of the law of the State of Mississippi cannot now be in doubt. This act was on the statute books, plain and unambiguous, and being so thus, the Appellant was admitted to do business upon condition of compliance with all laws of the State of Mississippi (Section 5136, Code 1930), and this was one.

As said in *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332:

> "It would be far better for those corporations, whose existence and maintenance depends upon following the law, to observe it rather than to flout it, or seek to contract against it. They are under no compulsion to make such bonds, but if they make them, such bonds will be construed and applied as if they had complied with the law."

The bond which it executed specifically declares (Tr., 18):

> "Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18, 1926, to construct 'Eola Hotel' building as per plans and specifications * * * a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

Hence, a specific obligation definitely set out was there referred to, and by said Article 30 it was expressly

provided that in addition there is "also the bond should secure the owner the full and faithful performance of the contract."

We thus have a specific obligation to include in Burkes' bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder", so, when the Indemnity Company made this obligation a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido*, with the contractors of the fulfillment of the terms of the foregoing (Tr., 17). That which went before declare the absolute obligation to pay all persons for materials (Art. 9, Tr. 14). Its meaning, as a contract, is solely a state question. *Ramsey & Gatlin Con. Co.* v. *Vincennes Bridge Co., supra.*

This Court has been liberal in protecting materialmen and sustaining the validity of legislation to that end. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 540, 48 L. ed. 787; s. c., 30 C. C. A. 108, 86 Fed. 371.

We therefore submit that the judgment should be affirmed because based upon a construction of a local contract, even though the Federal question was raised, for the local question is an adequate basis for the de-

cision rendered. *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 8, 75 L. ed. 134; *Susquehanna Power Co.* v. *State Tax Com.*, 283 U. S. 300, 75 L. ed. 1049; *Atchison, T. & S. F. R. Co.* v. *Railroad Com.*, 283 U. S. 390, 75 L. ed. 1136.

Respectfully,

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(All italics ours.)

FILE COPY

DEC 16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET ALS., APPELLEE.

APPELLEES' BRIEF IN OPPOSITION TO APPELLANT'S MOTIONS AND CONSENTS TO MAKE AETNA CASUALTY & SURETY COMPANY A PARTY APPELLANT, AND TO AMEND PROCEEDINGS ON APPEAL.

MARCELLUS GREEN,
GARNER W. GREEN,
GERARD BRANDON,
G. H. BRANDON,
CHAS. F. ENGLE,
S. B. LAUB,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET ALS., APPELLEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

APPELLEES' BRIEF IN OPPOSITION TO APPELLANT'S MOTIONS AND CONSENTS TO MAKE AETNA CASUALTY & SURETY COMPANY A PARTY APPELLANT, AND TO AMEND PROCEEDINGS ON APPEAL.

In the within entitled cause the Hartford Accident & Indemnity Company, Appellant, appealed to the Supreme Court of the State of Mississippi from an

adverse judgment rendered against it by the Chancery Court of Adams County, Mississippi (R. 58).

The judgment of the Chancery Court was affirmed as to the appellees here against the appellant and against the surety on the supersedeas appeal bond from the said Chancery Court to the Supreme Court of the State of Mississippi, to-wit: Aetna Casualty & Surety Company (Bottom R. 75).

The judgment rendered by the Mississippi Supreme Court was a joint judgment against the appellant, Hartford Accident & Indemnity Company, Principal, and its surety, Aetna Casualty & Surety Company (Bottom R. 79).

The Hartford Accident & Indemnity Company alone filed a Suggestion of Error in the Mississippi Supreme Court, suggesting that the former opinion be corrected and reversed.

This Suggestion of Error was not joined in by Aetna Casualty & Surety Company (R. 83).

The Suggestion of Error having been overruled the joint judgment became final on June 15th, 1931 (R. 90).

A petition for appeal to the Supreme Court of the United States was filed on July 25th, 1931, by the Hartford Accident & Indemnity Company only, and this petition was not joined in by Aetna Casualty & Surety Company (R. 91).

There was an Assignment of Errors filed on July 25th, 1931, in the Supreme Court of Mississippi by Hartford Accident & Indemnity Company in connection with its petition for the allowance of an appeal to the Supreme Court of the United States, but this

Assignment of Errors was not joined in by Aetna Casualty & Surety Company nor did the Aetna Casualty & Surety Company file a separate petition for appeal or Assignment of Errors (R. 92).

On July 25th, 1931, there was an order granting an appeal from the Supreme Court of the State of Mississippi to the United States Supreme Court to the Hartford Accident & Indemnity Company, but there was no such order in favor of Aetna Casualty & Surety Company (R. 95).

The Hartford Accident & Indemnity Company addressed a Praecipe for transcript of record on July 25th, 1931, to the Clerk of the Supreme Court of Mississippi (R. 96).

The record discloses that copy of this Praecipe was served on all appellees, but none was served upon the Aetna Casualty & Surety Company nor did the Aetna Casualty & Surety Company join in the Praecipe, as disclosed by the Record.

The Record at page 100 discloses a statement of points to be relied upon by Hartford Accident & Indemnity Company, and there was an acknowledgment of service of the statement of points by all appellees (R. 102) but nowhere is there a statement of points to be relied upon by Aetna Casualty & Surety Company nor any record of service thereof upon the Aetna Casualty & Surety Company.

The time to apply for Writ of Error and appeal by any party, including the Aetna Casualty & Surety Company, has now passed, since more than three months have elapsed since the entry of the judgment or decree of the Supreme Court of the State of Missis-

sippi in this cause. In fact the time elapsed on September 15th, 1931 (R. 86).

See 43 *Statutes at Large*, 940; U. S. C. A., Title 28, Section 350.

And the requirement that application for appeal must be made within three months is mandatory and jurisdictional and cannot be avoided by consent, waiver or order of the Court.

Rust v. *Jackson*, 250 U. S. 76; 63 L. Ed. 851.

Scale Co. v. *Computive Scale Co.*, 261 U. S. 399; 67 L. Ed. 719.

Robie v. *Hart, Shaffner & Marx*, 40 Fed. (2) 871.

American Baptist Home Mission Society v. *Barnett et al.* (Circuit Court of Appeals, Second Circuit), 26 Fed. (2) 350; certiorari denied 278 U. S. 626; 73 Law Edn. 546.

The appellees filed in this Court a motion to dismiss the appeal herein, and the first point as the basis of said motion was that the judgment rendered in the Supreme Court of Mississippi was a joint judgment against Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, surety on the appeal bond, and that no appeal has been taken by the Aetna Casualty & Surety Company, and hence there is no jurisdiction of the appeal at the instance of Hartford Accident & Indemnity Company alone.

It was not until this motion to dismiss or affirm was filed in this Court that Aetna Casualty & Surety Company moved for joinder in appeal in this Court.

> "It is well settled that all parties against whom a judgment of the kind hereinabove shown

is entered must join in an appeal or formerly in a writ of error in event that any one of them takes out such appeal or writ of error; or else there must be a proper summons and severance in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Williams v. *Bank of United States*, 24 U. S. (11 Wheaton) 414; 6 Law Edn., 508.

And as in the present case here on appeal:

"Where a judgment is distinctly one against a defendant and his surety on a bond, jointly, for a definite sum of money, and there is nothing distinctive in the judgment, all the parties against whom the judgment is entered must join in a writ of error or appeal, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Z. N. Estis v. *Trabue Davis & Co.*, 128 U. S. 225; 32 Law Edn. 437; 9 Sup. Ct. Rep. 58.

"A general judgment rendered against the original defendant in a case and the surety on a supersedeas bond given by it is joint, and such original defendant cannot alone review the same by writ of error, without summons and severance as to its co-defendant."

Lamon v. *Speer Hardware Co.*, 190 Fed. 734; 111 C. C. A. 462.

Humes v. *Chattanooga Third National Bank*, 54 Fed. 917; 4 C. C. A. 668.

See also *D. L. Thomas* v. *John D. Wyatt*, 17 Miss. (9 S. & M.) 308.

The Aetna Casualty & Surety Company motion comes now too late.

> "Belated appearance of necessary party appellant and request to join as an appellant is not equivalent to summons and severance within rule requiring joinder in appeal of all parties affected by decree or exclusion by severance of those failing to join after summons or notice."
>
> *American Baptist Home Mission Society* v. *Barnett et al.*, 26 Fed. (2) 350; certiorari denied 278 U. S. 626; 73 Law Edn. 546.

> "Where there is a substantial defect in a writ of error, which this Court cannot amend, it has no jurisdiction."
>
> *Wilson* v. *Life & Fire Ins. Co.*, 37 U. S. (12 Peters) 140; 9 Law Edn. 1032.

It will then of its own motion dismiss the case without awaiting the action of a party.

Hilton v. *Dickenson*, 108 U. S. 165, 168; 27 Law Edn. 688, 689.

Even of the Court could otherwise allow an amendment the fact that the statute has run would prevent its doing so in the present case.

Estis v. *Trabue Davis & Co.*, 128 U. S. 225; 32 Law Edn. 437.

Wilson v. *Fire & Life Ins. Company*, 37 U. S. (12 Peters) 140; 9 Law Edn. 1032.

The Supreme Court of Mississippi has never allowed this appeal to Aetna Casualty & Surety Co. and consent does not confer jurisdiction. *Mills* v. *Brown*, 16 Pet. 525; 10 L. Ed. 1055.

We, therefore, respectfully submit that the motion by Aetna Casualty & Surety Company to amend proceedings should be disallowed and overruled and that the appeal of Hartford Accident & Indemnity Company should be dismissed.

Respectfully submitted,

MARCELLUS GREEN,
GARNER W. GREEN,
GERARD BRANDON,
G. H. BRANDON,
CHAS. F. ENGLE,
S. B. LAUB,
W. A. GEISENBERGER,
L. T. KENNEDY,
E. H. RATCLIFF,
JOS. E. BROWN,
W. C. MARTIN,
C. F. BYRNES,
Attorneys for Appellees.

MARCELLUS GREEN,
By GARNER W. GREEN,
Of Counsel for Appellees.

I acknowledge receipt of copy of this Brief.

T. BARRETT JONES,
Atty. for Hartford Accident & Indemnity Co.

FILE COPY

DEC 21 193

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

MARCELLUS GREEN,
GARNER W. GREEN,
CHAS. F. ENGLE,
S. B. LAUB.
Attorneys for Appellees.

MARCELLUS GREEN,
GARNER W. GREEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO DISMISS OR AFFIRM.

Comes Natchez Investment Company, Inc., appellee herein, and Engle & Laub, for whose use and benefit a judgment was rendered in favor of Natchez Investment Company, Inc., and move the court to dismiss as to them, or to affirm for want of substantial Federal question, and for reasons assign:

I.

The judgment in the Supreme Court of Mississippi in favor of appellee (Tr. 82) was a several judgment rendered jointly against Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company,

1y

surety on the appeal bond to that court. No appeal has been taken by Ætna Casualty & Surety Company, and hence there is no jurisdiction at the instance of Hartford Accident & Indemnity Company alone.

II.

But if said appeal were properly had, which movants deny, then thereunder, as to these movants, dismissal must be had because there are no pleadings and/or proof in the transcript whereunder the judgment of the Supreme Court of Mississippi may be reversed.

III.

If said appeal were properly had, and if the court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as these appellees are concerned.

IV.

The decree of the Chancellor (Tr. 59) in favor of Natchez Investment Company, Inc., for the use and benefit of Engle & Laub, was rendered, not under any statute law of the State of Mississippi attacked in this proceeding, but was rendered under the provisions of the contract documents, and there can be no Federal question involved as to the allowance of this attorney's fee, the court having held that the attorney's fee was allowable under the contract documents for the institution of concursus proceedings, and that said proceedings were necessary, and this judgment involves only a local question not connected in any way with the statute law of Mississippi attacked in this proceeding.

Wherefore these appellees make this motion, having specifically reserved their rights so to do (Tr. 103-4).

MARCELLUS GREEN,
GARNER W. GREEN,
CHAS. F. ENGLE,
S. B. LAUB,
Attorneys for Appellees.

MARCELLUS GREEN,
GARNER W. GREEN,
Of Counsel.

To Messrs. Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, counsel for appellant:

Please take notice that the foregoing motion to dismiss or affirm, with the annexed brief, will be presented to the Supreme Court of the United States upon the 4th day of January, 1932, or as soon thereafter as may be, for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

MARCELLUS GREEN,
GARNER W. GREEN,
FORREST B. JACKSON,
CHAS. F. ENGLE,
S. B. LAUB,
Attorneys for Appellees.

Service of the foregoing is hereby acknowledged this 15th day of December, 1931.

W. CALVIN WILLS,
ARTHUR G. POWELL,
L. BARRETT JONES,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

BRIEF AND ARGUMENT.

General Statement.

Natchez Investment Company, [redacted] and Engle & Laub, for whose use and benefit (Tr. 59) the Chancery Court of Adams County, Mississippi, decreed the payment of $5,000 as attorney's fees (herein called appellees), move to dismiss or affirm, having specifically reserved this right (Tr. 103-4), wherein appearance was entered "without recognizing that any appeal has been validly made and without prejudice to right (to move) to dismiss."

Appellee, Natchez Investment Company, Inc., as complainant, filed this original bill (Tr. 1-9) against Hartford Accident & Indemnity Company and others.

None of the evidence whereon the decree (Tr. 59) in favor of appellees was rendered by the Chancery Court of Adams County, Mississippi, appears in the record, nor does that whereon the judgment in the Supreme Court (Tr. 73) was rendered, the form of the judgment there being:

> "Appellee, Natchez Investment Company, Inc,. and/or I. Levy, Receiver for the Natchez Investment Company, Inc., or T. S. Sholars, Trustee in Bankruptcy for Natchez Investment Company, Incorporated, for attorney's fees for services rendered by Engle & Laub do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Ætna Casualty & Surety Company, surety in the appeal bond, the sum of Five Thousand Dollars, the amount of the decree in the court below, together with the further sum of Five Hundred Dollars, being damages at the rate of 5 per centum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 per centum per annum. It is further ordered, adjudged and decreed that the costs on appeal be apportioned as follows:" (Tr. 82.)

The costs were taxed against the Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company in so far as these appellees are concerned.

The Supreme Court of Mississippi heard the cause first upon the appeal of Hartford Accident & Indem-

nity Company to settle principles (Tr. 46); next, upon the appeal on the merits (Tr. 67); and finally upon a suggestion of error (Tr. 86).

POINT I.

There being a joint judgment (Tr. 74-83) against Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, no Jurisdiction of an Appeal by Hartford Accident & Indemnity Company alone.

We adopt the brief and argument on this point set forth in the brief filed by the other appellees who were defendants in intervention.

POINT II.

Pleadings and proof presenting a Federal Question condition jurisdiction here.

We adopt the brief and argument on this point set forth in the brief filed by the other appellees.

POINT III.

If said appeal were properly had, and if the court should hold it had jurisdiction to reverse, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as these appellees are concerned.

We adopt the brief and argument on this point set forth in the brief filed by the other appellees who were defendants in intervention.

Point IV.

The decree of the Chancellor (Tr. 59) in favor of Natchez Investment Company, Inc., for the use and benefit of Engle & Laub, was rendered, not under any statute law of the State of Mississippi attacked in this proceeding, but was rendered under the provisions of the contract documents, and there can be no Federal question involved as to the allowance of this attorney's fee, the court having held that the attorney's fee was allowable under the contract documents for the institution of concursus proceedings, and that said proceedings were necessary, and this judgment involves only a local question not connected in any way with the statute law of Mississippi attacked in this proceeding.

The Article (30) of the contract documents contained the following provisions:

> "The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens and claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary" (Tr. 3).

The Chancery Court of Adams County held that the evidence in the case entitled appellees to a decree (Tr. 59).

The rendering of this judgment in favor of appellee was not because of any statute law of the State of Mississippi, but this judgment was rendered solely upon the contract documents and the evidence adduced in support of the right to recover a judgment for attorney's fees.

The jurisprudence of Mississippi was in favor of the rendition of this judgment.

Dixon v. *United States Fidelity & Guaranty Company,* 117 So. 245; 150 Miss. 864.

We therefore submit that the appeal should be dismissed as to these appellees and the judgment affirmed because based upon a construction of a local contract involving in no aspect any Federal question.

Respectfully,

MARCELLUS GREEN,
GARNER W. GREEN,
CHAS. F. ENGLE,
S. B. LAUB.
Attorneys for Appellees.

MARCELLUS GREEN,
GARNER W. GREEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

BRIEF ON THE MERITS FOR APPELLEES NAMED WITHIN.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

BRIEF ON THE MERITS FOR

Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, Doing Business as Bunn Electric Co.; Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, Doing Business as Schultz Cabinet Works; Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr. and R. Hicks Parker, Copartners, Doing Business as Natchez Brick Co.; C. R. Burkett, Doing Business as Burkett Sheet Metal Works; W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co., Natchez Investment Co., and Engle & Laub, Appellees.

Express Reservation.

These appellees, having filed Motions to Dismiss and/or affirm, reserve, expressly, in this Brief upon the merits, all of the rights therein claimed, and first hereby insist upon said motion.

Statement of the Case.

This case involves the liability, in equity, of the surety, appellant, on a building contractor's bond for materials furnished to the contractor for the building of the Eola Hotel, at Natchez, Mississippi, by the Natchez Investment Company, the owner, appellee.

The questions arising are:

(1) The construction of the bond and the measure of liability of the surety thereon for materials furnished the contractor, principal in the bond, as a common law obligation.

This proposition has been fully briefed in our Motions to Dismiss or affirm, which is hereby adopted to save iteration.

(2) Whether appellant, a paid surety, doing an insurance business, and receiving compensation for such suretyship admeasured by the risk assumed, can question the constitutionality of the statutes of Mississippi, Section 3074, Code 1906, as amended by Chapter 128, Laws of 1918 (now Sections 2274-2281, Code 1930), even if the bond was executed under said statutes.

(3) Said Chapter 128, Laws of Mississippi, 1918 (Sections 2274-2281, Code of 1930), does not violate the Federal Constitution.

(4) The application of Ætna Casualty & Surety Company, surety of appellant on appeal bond to the Supreme Court of Mississippi, to become an appellant herein cannot be allowed.

The Pleadings and Evidence.

The Natchez Investment Company, the owner of the hotel constructed, obligee of the bond of the contractors, Burkes, filed its original bill in equity against (*a*) Burkes, the contractor; (*b*) appellant, the surety on the contractor's bond; (*c*) the materialmen and laborers who furnished the labor and materials to the contractor for the construction of the hotel; (*d*) and New Orleans Canal Bank & Trust Company, assignee of certain proceeds arising from the contract of construction, defendants to the bill.

The bill averred that the owner "is entitled to have it ascertained and determined whether said Bond" (of appellant) "in connection with said contract and specification is a bond *for the faithful performance of said contract* or *simply a bond of indemnity*" (Tr., 8). Reference is made specifically in the bond to concursus proceedings and the plans are made part thereof.

The prayer was to adjudicate whether this bond was for the faithful performance and thereby superior to all liabilities provided by Section 2, Chapter 128, Laws 1918, or subject thereto (Tr., 9).

The agreement, Exhibit "A" (Tr., 10), is "the standard form of agreement between contractors and owner for construction of buildings, issued by American Institute of Architects for use when a stipulated sum forms the basis of payment." *Johnson Electric*

Co. v. *Columbia Casualty Co.*, 133 So. (Fla.) 851, shows it slightly modified, but the Supreme Court of Mississippi held its obligation the same.

> "Article 6: *The Contract Documents*—The general conditions of the contract, the specifications, the drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto or herein repeated" (R. 12).

By the terms of the contract documents the Contractor obligated itself to give a bond to secure the Owner the faithful performance of the contract in strict accordance with the plans and specifications.

Amongst the obligations thereby intended to be secured were the obligations of the contractor to pay laborers, materialmen and sub-contractors for all work, labor and material that should go into the building.

It was further provided in the contract documents that the contractor's bondsmen should obligate themselves to all the terms and covenants of the specifications and of the contracts and contract documents, and amongst these obligations of the contract so to be guaranteed was the contractor's obligation to pay for all labor and material that should go into the building.

Furthermore, by the contract documents it was provided that the sureties of the various contractors (which necessarily included the principal contractors, J. V. & R. T. Burkes) should be, and they thereby declared and acknowledged themselves to be, bound to the Owner as guarantors separately and *in solido* with the contractors for the fulfillment of the terms of the contract documents.

This, necessarily, made the sureties assume all the obligations of the contractor under the contract documents and made such sureties liable for said obligations separately and *in solido* and, therefore, to all intents and purposes, as principals.

Amongst the obligations thereby intended to be covered was the obligation of the contractor to pay for labor and material (R. 3, 4). When this Appellant, Hartford Accident & Indemnity Company, executed its bond at the solicitation of J. V. & R. T. Burkes, and in pursuance of the contract made between Burkes and the Owner, the Hartford Accident & Indemnity Company on the face of its bond referred to the plans and specifications and contract documents, and by specific reference made the same in all their parts and clauses a part and parcel of the bond itself (R. 18).

We submit in the first instance that these obligations so specifically undertaken by Hartford Accident & Indemnity Company were undertaken by it solely and in consideration of the premium paid to it by the contractors.

Under local practice, upon demurrer, exhibits control the averments of the pleading. *McNeill* v. *Lee*, 79 Miss., 455.

The specifications appear, Exhibit "B" (Tr., 14); the bond, Exhibit "C" (Tr., 17).

The appellant demurred (Tr., 39), assigning, roughly, first, the bond was not a performance bond under Chapter 128, Laws 1918, but if the Court should hold otherwise, then, in virtue thereof, the constitutional rights of appellant were violated.

The petitions of appellees, materialmen, in said suit do not appear in the record.

The demurrer was overruled (Tr., 41), with an appeal allowed to the Supreme Court to settle principles of the case (Tr., 41); with the judgment thereon (Tr., 57). Then, as to these materialmen appellees, nothing further appears as having been done in the Chancery Court, save the rendition, on January 10, 1930, of final decree (Tr., 57), upon a full hearing on the merits.

Upon appeal therefrom to the Mississippi Supreme Court, the opinion was filed February 23, 1931 (Tr., 67) and judgment entered (Tr., 80, 81); a suggestion of error (under local practice, a petition for rehearing), was filed by appellant, and the opinion of the Supreme Court thereon appears (Tr., 86), with the appeal to this Court by the appellant alone. The Ætna Casualty & Surety Company, surety on the appeal bond, did not join therein. On December 8, 1931, after motion filed in this Court by materialmen to dismiss, Ætna Casualty & Surety Company seeks, without application to the Supreme Court of Mississippi, an appeal, and to join herein, the time for appeal having long since expired. Thereto these appellees object.

POINT I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State Court is not, on this record, entitled to raise a Federal question with this premium in its pocket.

Point II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that, Appellees, materialmen, having placed their personalty—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274-2281, Code 1930), does not violate the Federal Constitution.

Point IV.

Should the Court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common law obligation for judgment rendered.

Point V.

The application of Ætna Casualty & Surety Company, Surety of appellant on appeal bond to the Supreme Court of Mississippi, to join in this appeal cannot be allowed.

POINT I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State Court is not, on this record, entitled to raise a Federal question, with this premium in its pocket.

Section 5129, Code of Miss., 1930 (Sections 2550, 2557, Code of 1906), makes Surety Companies transacting business in Mississippi, insurance companies.

Section 5131, Code 1930 (Section 2563, Code 1906), gives all such contracts a Mississippi *situs*. *Fidelity, etc., Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817.

As said in *Insurance Co.* v. *Yates*, 214 Ill. 272, 73 N. E. 423:

> *"It"* (insurance) *"is a public necessity that deals in its own credit for a cash consideration from the assured, and is stamped with public interest, and must yield obedience to the necessary and proper regulations by the State in the exercise of its police power."*

In *U. S. F. & G. Co.* v. *Citizens State Bank*, 150 Miss. 386, 116 So. 608, Mr. Justice Pack said:

> "* * * This being a fidelity bond, it is now well settled that such contracts are to be construed by the same principles of law applicable to contracts of insurance."

United States, etc., Co. v. *United States*, 191 U. S. 422, 48 L. Ed. 245; *Home Insurance Co. of N. Y.* v. *Moore*, 151 Miss. 189, 117 So. 524; *United States Fidelity & Guaranty Co.* v. *Hood*, 124 Miss. 548, 87 So. 115; 15 A. L. R. 605; *Murray* v. *Metropolitan Life Ins. Co.*, 145 Miss. 266, 110 So. 660; *Hormel* v. *American*

Bonding Co., 35 L. R. A. (N. S.) 513 (monographic note).

The rule is thus stated in *American Surety Co.* v. *Pangburn*, 182 Ind. 116, 105 N. E. 769, 770:

> "* * * The overwhelming weight of recent American authority does not accord such surety the right to invoke the rule of *strictissimi juris*, but places such contract in the insurance class and measures the right of such surety by the law applicable to insurance contracts. *United States Fidelity & Guaranty Co.* v. *Poetker*, 180 Ind. 255, 102 N. E. 372, and authorities cited; Monographic note to *Hormel & Co.* v. *American Bonding Co.*, 33 L. R. A. (N. S.) 513."

In *Lackland* v. *Renshaw*, 165 S. W. 314, 315, the Court said:

> "* * * While such corporations may call themselves 'surety companies', their business is in all essential particulars that of insurance. Their contracts are usually in terms prescribed by themselves. * * *"

Therefore, being engaged in the business of insurance, as to appellant, the Legislative power is admeasured by *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gorman* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163, 51 Sup. Ct. 130; *Tyson* v. *Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, October Term, 1931, U. S. Supreme Court Advance Opinions No. 3, page 65; *Herbring* v. *Lee*, 280 U. S. 111, 74 L. Ed. 217.

As was said by Mr. Justice McKenna in the *Lewis Case, supra:*

> "We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling, if not compelling it."

The appellant does not show what premium it exacted from the owner for the obligation hereunder assumed, that is to say, whether this premium received covered compensation exacted by appellant for the payment to the subcontractors, as by the Mississippi court held; or did not. The form was taken from Louisiana (Opinion of Ethridge, P. J., Tr., 88). In Louisiana, the obligation to give a bond for payment to subcontractors is compulsory. Act 298, Laws of 1926. Without question, recovery to subcontractors therein have been in all instances, vouchsafed. *Stewart* v. *Segal,* 126 So. 718, 13 La. App. 359; *McDonald* v. *H. Gas & Oil Co.,* 2 La. App. 241; *Baton Rouge Sash, etc., Co.* v. *Deceur,* 2 La. App. 129; *Jarbart* v. *U. S. F. & G. Co.,* 3 La. App. 525.

And the surety under the Louisiana law knew that claims of materialmen against the surety on the contractor's bond were not affected by a breach of contract by the owner. *Fidelity Homestead Assn.* v.

Kennedy, 158 La. 1059, 105 So. 64. And further well knew when using this form that the surety on a contractor's bond is limited to defenses that can be made by the contractor in a suit for materials furnished to contractor. *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.*, 163 La. 1, 111 So. 470.

The appellant well knew the contrariety of judicial opinion, and being an insurance company did not disregard the possibility of this imposition and, with deference, exacted a premium therefor which having been collected imposed this liability to subcontractors. *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. (Fla.) 851.

Thus, so knowing, appellant computed the premium exacted. It is not herein shown that the premium herein exacted for the covenant undertaken was not the full premium requisite under the Louisiana law to make payment to all subcontractors and as enforced by the Mississippi court. If so, then, when in virtue of this payment, so thus exacted to cover this obligation to subcontractors as to materialmen, precisely as in case of Government contracts, the appellant is estopped to raise the Federal question, when it has in its pocket the premium requisite to pay therefor; to allow it to escape the payment would be to donate to the appellant, an insurance company, something to which it was not entitled. Having received the benefit in the form of this premium for the assumption of the obligation, it may not contest it. *Frost* v. *Corporation Commission*, 278 U. S. 531, 73 L. Ed. 492; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 307, 73 L. Ed. 395; *Wall* v. *Parrott Silver & Copper Co.*,

244 U. S. 407, 61 L. Ed. 1229; *Leonard* v. *Vicksburg, etc., R. Co.*, 198 U. S. 416, 49 L. Ed. 1108.

Being a paid surety, engaged in the insurance business, and its obligation to the materialmen being conditioned by its exaction of the owner for the undertaking had, the right of such appellant to urge the unconstitutionality must be admeasured by the premium exaction, whether, irrespective of the constitutionality or unconstitutionality, it exacted of the owner the full premium covering the unconditional payment as above delineated, it may not, having so thus exacted, complain of the act being unconstitutional, especially as it assumed to make the bond conditioned as by law required, which might well be valid as a common law obligation independently of the statute. *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574.

In *Byram Lumber & Supply Co.* v. *Page*, 109 Conn. (1929) 256, 146 A. 293, it is said:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."

U. S. F. & Co. v. *United States*, 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242, 246; *Algonite Stone Mfg. Co.* v.

F. & Dep. Co. of Maryland (Kans. 1917), 163 Pac. 1076, 100 Kans. 28.

There is no pretense here that the amount paid by the owner for this bond was any different from what would have been exacted for a contract in behalf of the United States Government whereunder this precise obligation here enforced was inherent. The surety company, thus doing business for profit, must have admeasured its premium so as to cover the contingency for satisfaction of subcontractors, and having thus received a premium therefor, may not under Mississippi decisions pay losses upon a different basis. *Insurance Company* v. *Shlenker*, 80 Miss. 667, 32 So. 155, where it is declared:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

And it not being shown that the premium exacted did not cover the payment to subcontractors, this paid surety may not be discharged because proof of damage conditions release generally. Compare *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *City of Philadelphia* v. *Fidelity & Deposit Co.*, 231 Pa. 208, 80 Atl. 62; *Murray City* v. *Banks*, 219 Pac. 246, 248; *Standard Salt & Cement Co.* v. *Nat. Surety Co.*, 134 Minn. 121, 158 N. W. 802; *United States* v. *U. S. F. & G. Co.* (C. C.), 178 Fed. 721.

So, where appellant, as an insurance company, contracted, as it did, for a consideration to it paid, know-

ing the contrariety of judicial decisions upon this subject, and knowing that the form utilized from Louisiana required the payment specifically, it may not as a paid surety seek exculpation without a demonstration that the premium exacted did not cover the risk inherent to payment of the subcontractors precisely as was contemplated by the Louisiana statute whereon the bond was drawn, and as held by the Mississippi Court. It not appearing, therefore, that appellant is now required to do other than that wherefore it exacted premium, it, as an insurance company, may not herein complain. The rights that appertain to a private individual may not be claimed by a corporation when dealing in a business affected with a public use. Compare *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432; *Herbring* v. *Lee*, 280 U. S. 116, 74 L. Ed. 221; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, *supra*.

POINT II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that, Appellees, materialmen, having placed their property—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

We advert to, by reference, that appellant was in the insurance business for a consideration pursuant to

permission therefor granted by Mississippi under its plenary power. Unless appellees receive from appellant pay for their material integrated into a structure wherefor appellant was responsible—bound to deliver it as an entity free of liens—they will go unpaid.

In Mississippi, initially, the sole protection provided materialmen was found in Section 3074, Code of 1906, whereunder immediately, when the contract was made the contractor might assign and defeat all rights of the materialmen. *Spengler* v. *Lumber Co.*, 94 Miss. 780, 48 So. 966. And therein the differentiation was made between the New York theory of subcontractors' rights and the Pennsylvania theory, and with reference to said section, it was remarked:

> "*This section might have provided, if the legislature had preferred the Pennsylvania system, that no assignment should be made by the contractor which would be good against the materialmen;* but it did not so provide. It might have expressly given the materialmen and the subcontractors, as the Pennsylvania system does, direct liens, equal in all respects to the lien of the original contractor; but it expressly refused to do that."

In *Dickson* v. *U. S. F. & G. Co.*, 117 So. 248, 150 Miss. 864, Mr. Justice Anderson said:

> "Prior to the adoption of chapter 128, Laws of 1918, Hemingway's Code 1927, Sections 2596 to 2603, inclusive, money due a contractor under a building contract was not impressed with any trust or equity in favor of materialmen and laborers furnishing materials and labor going into the construction of a building. Such funds,

> under the contract, belonged to the contractor absolutely, who had the right to assign or otherwise dispose of them as he saw fit, although to the prejudice of such laborers and materialmen. * * * But that is not true now since the adoption of that statute unless the contractor gives the bond provided by section 3 of the statute (section 2598, Hemingway's Code 1927), quoted above. If the contractor does not give the bond provided by the statute, laborers and materialmen have an equity under section 1 of the statute, Hemingway's Code 1927, Section 2596, in the funds due the contractor by the owner of the building. *But where the bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammeled.* The purpose of the bond section of the statute was to provide for the protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract. *The bond provided by the statute has the same purpose and effect as the bond required of a contractor doing public work by section 1, chapter 217, Laws of 1918 (Hemingway's Code 1927, Section 2617).*" (Italics ours.)

This is a direct decision putting this bond upon the precise basis made available by Congress and uniformly enforced without question by this Court.

See, also, *Davis Co.* v. *D'Lo Guaranty Bank,* 133 So. (Miss. 1931), 223.

At the same session of the Legislature, Chapter 217, Laws 1918, was enacted imposing precisely the same obligation in favor of material on public work—the validity of which appellant here concedes.

Compare *Commercial Bank* v. *Evans,* 145 Miss. 643, 112 So. 482, where the Court said:

> "The statute wrote into Owen's bond the condition it required to be in there. The statute is mandatory. The obligor and the obligee, as well as the sureties on the bond are presumed to have known what the statute requires when the bond was executed. The bond having been executed, and having accomplished its purpose, the law will write into the bond what it requires should be written. In other words, in the execution of a bond by a contractor to do public work, so far as the condition of the bond is concerned, the law takes care of that, and makes it what it should be."

McElrath v. *Kimmons,* 146 Miss. 775, 112 So. 164; *Stowell* v. *Clark,* 152 Miss. 32, 118 So. 370.

In *Standard Oil Co.* v. *National Surety Co.,* 143 Miss. 841, 107 So. 559, Mr. Chief Justice Smith said:

> "It is true that the bond here in question does not provide on its face that the Clark-Hunt Contracting Company shall promptly make payment to all persons supplying labor or material for the work to be done by it for the drainage district, but it does expressly provide for the performance by the Clark-Hunt Contracting Company of all 'the matters and things' contained, set out, or referred to in its contract with the drainage district, one of which is that it 'shall discharge all claims for work done and materials furnished in the prosecution of the work', and shall furnish the drainage district with evidence that 'all persons who have done work or

> furnished material under this contract have been fully paid for such work or material.' *The performance of this stipulation of the contract is, therefore, one of the obligations of the bond executed by the Clark-Hunt Contracting Company to insure the performance by it of its contract.* The statute does not require the obligation that such contractor shall promptly make payments, etc., to be written in the bond. It simply requires such payments to be one of the obligations of the bond." (Italics ours.)

So when the bond here sued on was thus executed, making reference specifically to the obligations required by the contract, under this decision, these contractual obligations were integrated into the bond as definitely as if there placed at length. Insofar as a paid surety is concerned there is, with deference, by counsel's concession of the validity of such a law as to public contracts, an end of this litigation, for *quoad* the paid surety, the subcontractors in each case, with deference, from a constitutional viewpoint, occupy precisely the same position.

Further, this statute has been in effect nearly 15 years and has been so frequently enforced in Mississippi as to make a conscious disregard thereof by a contracting insurance company an impossibility, especially, when it came to fixing the premium, Point I, *supra.*

As above pointed out, by Section 30 of Specifications (Tr., 16-17), dealing with the obligation of contractors and subcontractors, it was declared that he should

> "pay the cost of any required recordation of the contract and bond and the cost of any required cancellation of the same. *He shall also*

secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract."

"The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect the Owner against all liens or claims that may be filed against the building according to the Laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary" (Tr., 22). (Italics ours.)

Of course the Louisiana Statute, as law, had no extra-territorial effect, but privileges, as such, concursus proceedings, as such, and recordation, both of the bond and the contract, especially to "secure and pay for lien and privilege certificate * * * before final payment * * * under this contract," imported, *by agreement* of the surety, that obligation imposed by law in Louisiana, which in Mississippi became a contractual obligation. Thereasto, Act No. 298, Laws of 1926, of Louisiana, specifically provided by Section 2 that the owner was required to have a good and solvent surety and "the bond shall be attached to and recorded with the contract", providing therefore.

Section 3 of said Act No. 298 provides:

"Where the owner has required the bond herein provided, the said surety thereon shall be liable *in solido* with the contractor for all labor and materials used in said work of improvements and the cost of recording valid liens

> up to the amount of the bond, and the cancellation and erasure of the inscription of said contract, as hereinabove provided, shall not effect the liability of the said surety on said contract for such labor and materials, as to which labor and material said surety shall be bound to the same extent as the said contractor, undertaker, master-mechanic, or engineer, or other person undertaking such work."

Again, by Section 6, of said Act No. 298, in case of an insufficient bond, the owner was personally liable.

Under Section 8 of said Act No. 298—

> "A building contract may provide for partial payments as the work progresses and any payment made by the owner strictly in accordance with the contract shall absolve him from further liability, provided that he has exacted the bond and has recorded the contract and bond as required by this act."

Under Section 10 of said Act No. 298 the concursus proceedings are provided for and thereunder the attorney's fee is fixed, but thereasto the subcontractors are given preference, it being provided:

> "Any surety so desiring may invoke the concursus proceedings herein authorized by proper proceeding in court and by depositing in court at the time of the filing of the proceeding the full amount of the bond, provided that after the case is at issue such surety may withdraw with the permission of the court all of the deposit made except sufficient to cover the claims made in the concursus and twenty-five per cent additional thereto."

So, when appellant, a paid surety, had this contract executed in Mississippi, imported from Louisiana, he

was well acquainted with that thereunder required, and this Section 30 (Tr., 17), in addition to the unanswerable position taken by our own Supreme Court, and pointed out in our Motion to dismiss this appeal, demonstrating that appellant knew the possible liability, and knowing, contracted with reference thereto.

Therefore, that here in issue is Section 3 of said Act (Code 1930, 2276), whereunder:

> "In the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,"

namely, a provision,

> "for the payment of the claims of persons furnishing labor or material."

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274-2281, Code 1930), does not violate the Federal Constitution.

In *Parsons v. U. S. F. & G. Co.*, 112 So. 469, 147 Miss. 335, McGowan, J., reviewed the decisions, saying:

> "Counsel for appellant really bases his contention that the statute is unconstitutional upon the theory that section 3 of the act (chapter 128, Laws of Mississippi of 1918), abridges liberty

of contract, and cites *Gibbs* v. *Tally*, 133 Cal. 373, 65 P. 970, and the cases from that court which follow it, to wit, *Shaughnessy* v. *American Surety Co.*, 138 Cal. 543, 69 P. 250, 71 P. 701; *Montague & Co.* v. *Furness*, 145 Cal. 205, 78 P. 640; *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 192, 72 P. 964; *id.*, 139 Cal. 325, 73 P. 864; *Equitable Life Ins. Co.* v. *Stemmons* (Tex. Civ. App.), 239 S. W. 1039; and he also relies on *Hess* v. *Denman Co.* (Tex. Civ. App.), 218 S. W. 162, from the Texas court.

"The *Gibbs* v. *Tally Case, supra*, is the leading case relied upon and urged by counsel for the position that the act here in question in unconstitutional. In that case there was a claim of materialmen against the owner. The statute applied alike to the contractor and owner. The court said that it compelled the *owner to become responsible for a liability he had not incurred*, and *which was not for his benefit;* that it practically forbade him from improving his property by letting a contract unless he became liable therefor or furnished sureties who would be so liable.

"The California statute above cited required that the contract, if not filed, was void, and the effect of the statute was to make the contractor the agent of the owner. Counsel says this California statute is very similar to ours, but we are unable to trace any essential similarity save that it requires a bond to be taken, whereas our statute permits a bond to be taken by the owner.

"The statute we have under review does not require the owner to protect himself with a bond. It only provides that, if he takes bond, having put all the stipulations in the contract he desires, that the bond must inure to the bene-

fit of the laborers and materialmen, not in violation of the obligee's rights, but subservient thereto, and we are unable to perceive that the requiring of this stipulation in this bond is other than for the benefit of the owner and requires the contractor to do that which *he was legally and morally required to do, pay his debts, and the surety, with the law staring him in the face, may or may not thus undertake the indemnity of his principal, for the surety's right to contract is not impaired nor is his liberty to contract abridged or interfered with.*

"In the case of *Hess* v. *Denman Lumber Co.* (Tex. Civ. App.) 218 S. W. 162, a Texas statute providing for and requiring a bond to be taken by the owner from a contractor to secure performance of a building contract was declared unconstitutional, the court saying, in effect, in that case, that the provisions of the Revised Statute of 1911, art. 5623, as amended by Acts 1915, c. 143, requiring owner to contract with builder to give a bond conditioned as required by article 5623*a* as added by Acts of 1915, c. 143, was held void, being an interference with constitutional liberty of contract. Said statute specifically provided that the owner shall cause to be executed a written contract for the erection, etc., and shall also cause to be executed and filed with the county clerk, before the work is begun, a good and sufficient bond, and further provides that said bond shall inure to the benefit of materialmen, laborers, and the subcontractor, regardless of whether or not they are secured by any lien. The court said:

" 'But the law requires the owner to contract with the contractor to give a bond. It is compulsory contract purely. We think that it is

beyond the power of the Legislature to require an owner to contract with the contractor to give a bond, as done in this very act, because it is interference with the law of the liberty of contract. If the owner does contract to have the contractor give a bond, he is at liberty to do so as a subject-matter of contract; but if the owner does not so contract, a personal judgment cannot be rendered against him for not requiring the bond of the contractor.'

"It will be observed that this opinion is from the Court of Civil Appeals of Texas, Texarkana, and in the case of *Equitable Insurance Co.* v. *Stemmons*, 239 S. W. 1039, the Supreme Court of Texas denied a writ of error to the Court of Civil Appeals, which had followed the Texarkana court in *Hess* v. *Denman* in holding that the statute requiring the owner of the property to execute a bond was unconstitutional, and the declination by that court of the writ of error was tantamount to the approval of the decision rendered by the Court of Appeals in *Hess* v. *Denman, supra*, that the statute was void.

"The obvious distinction between our statute, section 3, and the Texas statute, is that our statute does not undertake, in any wise, to require the owner to demand and receive a bond for the performance of his contract, so that we do not think the Texas cases are authority upon which we could rely in this case.

"On the other hand, the weight of authority sustains the validity of this statute. In the case of *Roystone* v. *Darling*, 171 Cal. 526, 154 P. 15, an act, very much more similar to ours than the one considered in the Tally Case, was very vigorously challenged and held to be constitutional by the California court, with the Tally Case, the Shaughnessy Case, and the other cases

following the Tally Case in mind, and with express reference thereto, and the statute of 1911, considered in the Roystone Case, contained a provision for a bond to be furnished by the contractor to the owner. The court, speaking of this latter statute, says:

"'The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power. * * *

"'We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.'

"So that, the last utterance from the California court would be authority for upholding the constitutionality of this act, upon a statute more clearly like ours than the one declared unconstitutional in the Tally Case.

"Our investigation leads us to the conclusion that most of the appellate courts of this country, including the Supreme Court of the United States, have held that the *liens granted by the Legisature to subcontractors, mechanics, and materialmen, upon the land of the owner, are valid although the owner had no contractual relations with this class, and we think these are persuasive to sustain us in our view that the classification of mechanics, materialmen, and laborers as a class to be favored by the Legislature is not an arbitrary classification, but is reasonable, and has for its object the welfare of the country at large, and quite generally recognized as valid.* Especially is that true when we consider that on every hand by the thousands these contracts are multiplying, and such a vast number of our citizens are engaged as subcontractors, materialmen, and mechanics, and this class has been greatly augmented within the past decade. And especially is this true of our own state, where the sovereign itself is engaged in greater building enterprises than, perhaps, ever before in any one period, and from every hamlet, city, and town there comes the ring of the anvil, the tap of the hammer, and the music of the saw, as they vie with each other in general construction and improvement work.

"Building and construction is an essential under modern progressive conditions to the maintenance of commerce. Credit is as essential here in this line of endeavor as in other avenues of commerce. If the master workman or contractor were not assured of credit, then the surety would be called on in many instances to extend the credit so necessary to continued progressive movement or else complete the contract.

"A review of the authorities on the validity of the mechanics' and materialmen's lien would seem to be unnecessary. The essence of these decisions is to the effect, first, that the labor and material used in building are for the direct benefit of the owner for which the property improved should be liable; second, that he is presumed to contract with full knowledge of the law, and he has the power to protect himself against loss by safeguarding the fund necessary to pay for the labor and materials. These expressions of the courts generally answer every attack made upon the constitutionality of these laws respecting a lien upon the land of the owner. It is difficult to differentiate a statute giving a lien on property of the owner and a statute providing that the owner may, if he sees proper, take security by requiring a bond for the faithful performance of the contract, and that when such bond is taken (he may take it or not as he pleases), such bond shall stand as security for the payment of the materialmen and mechanics and an action be brought thereon inuring to the benefit of this class.

"In the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, 24 S. Ct. 577, 48 L. Ed. 778, the Supreme Court of the United States held that liberty of contract is not unreasonably interfered with, nor is property taken without due process of law, by the provisions of Ohio Rev. Stat. Sections 3184, 3185, and 3185*a*, giving a lien on the property of the owner to subcontractors, laborers, and those who furnish materials to be used by the contractor in the execution of his contract with the owner; and this, too, at a time when the Supreme Court of the United States was advised that the Ohio Supreme Court had declared

these statutes to be invalid and unconstitutional. The court devoted but little space to that question, but expressly approved the opinion of the Circuit Court of Appeals in the case then under review and *the opinion written by Judge Lurton, who cogently stated the reasons in support of the constitutionality of this statute, and cited Jones* v. *Great Southern Fireproof Hotel Co.*, 86 *F.* 371, 30 *C. C. A.* 108. We also cite that case as being in favor of the constitutionality of the statute here under review, there being no such interference with 'liberty of contract' contemplated by the Fourteenth Amendment in the statute here under review as to warrant this court in declaring it invalid. The reasoning and logic in support of the mechanics' lien statute is just as strong, just as cogent, just as powerful, and just as applicable to the statute here requiring that if a bond be taken by the owner to secure performance of the building contract, that it shall contained a stipulation protecting the materialmen and laborers subordinate to the rights of the obligee in the bond.

"The case most nearly in point is that of *Rio Grande Lumber Co.* v. *Darke*, 50 Utah, 114, 167 P. 241, L. A. A. 1918A, 1193. Passing upon the validity of the Utah statute which requires the property owner when contracting for the erection of a building to take a bond to himself for the benefit of every person interested, and the Supreme Court of Utah stated that it was unable to find any reason for declaring the statute in question unconstitutional; they reviewed at length the California cases, and, quoting from the main California case, the Utah court said:

" 'The statute does not say who shall cause this bond to be executed, nor to whom it shall,

in form be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event.'

"And the Utah court proceeds, to say, in effect, that the points made in the above quotation constitute the principal objection of the California court to the statute, and called attention to the fact that no portion of the above criticism could be justly applied to the Utah statutes. The court discussed the *Roystone Case*, a later California case, and, after comparing and conceding the analogy between the materialmen's statute and the bond statute, the court comes to a conclusion in the following language:

" 'The bond, as in this case, is conditioned for the faithful performance of the contract and securing the payment of laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands. Under the Mechanic's Lien Law, if he fails to hold the fund for the payment of laborers and materialmen, the same misfortune may occur. To use the epigrammatic expression of respondent's brief: 'Under the bond statute he must take care to exact the bond, and under the lien statute he must take care to hold the fund.' We are unable to find any reason for declaring the statute in question unconstitutional. Certainly, to say the least, reasonable doubts as to its unconstitutionality,

> after thoroughly considering the question, are such as to render it the imperative duty of the court to declare the statute valid as against the objections made. It is ordered by the court that the judgment be affirmed.'
>
> "When we consider that in the instant case this last-mentioned rule of construction must control where the constitutionality or validity of the statute is involved, then it is just as binding upon us as any other rule; and after fully and fairly considering the powers of legislative bodies, and the limitation of their power under the Constitution, if there is a reasonable doubt in the mind of the court, then that doubt must be cast in favor of the validity of the act."

And citing to approve *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. Ed. 606.

The only case cited by opposite counsel not specifically reviewed in *Parsons* v. *U. S. F. & G. Co.*, 112 So. 469, 147 Miss. 335, *supra*, is *Kelly* v. *Johnson*, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573; but that decision assumed only to follow a prior decision of Ohio, in *Palmer* v. *Tingle*, 45 Ohio St. 423, 45 N. E. 313; a Michigan case, *Spry Lumber Co.* v. *Murphy*, 148 Pa. St. 337, 23 A. 1134.

Mr. Justice Harlan, in *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 547, 48 L. Ed. 788, dealing with the precise question said:

> "We are constrained to withhold our assent to the views expressed by the Supreme Court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substan-

tially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the circuit court of appeals in this case. *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371. *As the reports of the decisions of the circuit court of appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing in the margin some authorities which, in our judgment support the views expressed by the circuit court of appeals. It results that the decree must be affirmed.*" (Italics ours.)

Therefore, dealing with the Federal Constitution—the State Constitution being here eliminated, we have the decision of this Court condemning the reasoning of the Illinois Court as to Section 21 of the Act there involved. The proper rule being declared in the case of *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532,, 48 L. Ed. 778, approving an opinion by Mr. Justice Lurton in *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371, which case, especially the opinion in the Court of Appeals, adopted by this Court, is conclusive of the point here at issue.

After a thorough review of all cognate cases, Judge Lurton, later Mr. Justice Lurton, laid down the theories whereunder this legislation might be constitutional thus:

> "In neither of these cases, though the amounts involved were great, was any constitutional objection to the statutes giving the lien suggested, though very eminent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text writers. 2 Jones, Liens 286; Phil. Mech. Liens, Sec. 30; Boisot, Mech. Liens, Sections 22, 23. Overton on Liens (section 553) has been cited as advancing a contrary view. If we had doubt as to whether such statute was 'due process of law,' or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation, unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of government. Such statutes have met with the approval of the legislative bodies of nearly every state in the Union, as well as of Congress, as indicated by the Act of 1833, construed in *Winder* v. *Caldwell,* 14 How. 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.
>
> "But the validity of such statutes need not be rested upon mere authority. They find

sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any agreement the common law gave to one who, by his labor or expense, has made, preserved, enlarged, or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So, we find another illustration in the lien given one who, in the exercise of a quasi public employment, is required to receive or perform some service in respect to the thing upon which the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter, and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That wide class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him, and therefore fastens upon the thing, or that into which

it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction, although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished by a mortgaged railway company to keep it in operation, and preserve the property for the benefit of all interested.

"Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a bona fide and mala fide possession. *Green* v. *Bidle*, 8 Wheat. 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements, which had actually increased the value of the land. Courts of equity, therefore, soon applied the principle that, where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvements were in good faith. 2 *Story, Eq. Jur.*, Sections 799a, 799b, 1237, 1239.

"In *Bright* v. *Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, and same case in 2 Story, 605, Fed. Cas. No. 1,876, Justice Story laid down the broad doctrine that a bona fide purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after deducting rents and profits; and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in *Valles' Heirs* v. *Fleming's Heirs*, 29 Mo. 152, *Association* v. *Morrison*, 39 Md. 281, and *Hatcher* v. *Briggs*, 6 Or. 31, though it cannot be said to have received any very general support, though often cited. The reason is doubtless found in the fact that the equities of bona fide purchasers of defective titles were so generally recognized as to result in statutes in most of the states, called 'betterment' or 'occupant' statutes, which provide that a bona fide occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will, and which he might not desire, the courts have sustained their constitutionality, as giving remedy where before there had been none, though a strong equity existed. *Cooley, Const. Lim.* 486 *et seq.*; *Brown* v. *Storm*, 4 Vt. 37; *Ross* v. *Irving*, 14 Ill. 171; *Griswold* v. *Bragg*, 48 Fed. 519; *Hunt's Lessee* v. *McMahan*, 5 Ohio, 132; *Scott* v. *Mather*, 14 Tex. 235; *Davis* v. *Powell*, 13 Ohio 308; *McCoy* v. *Grandy*, 3 Ohio St. 463; *Bacon*

v. *Callender,* 6 Mass. 303; *Welch* v. *Wodsworth,* 30 Conn. 149; *Whitney* v. *Richardson,* 31 Vt. 300. The constitutionality of a similar Tennessee act was denied in *Nelson* v. *Allen,* 1 Yerg. 376, but Chief Justice Catron, in a note says the question did not arise.

"Not only was the equity so broadly declared and enforced by the civil law, but in that system of law very high consideration was given to all who had, by their contributions, benefited, preserved, or enlarged the estate or property of another; and, among creditors secured by a common pledge or mortgage, those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and, among this class, those whose contributions were last given and used had the preference. *Mackeldy, Rom. Law,* 280, 281.

"Domat says:

"'Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges.' *Domat Civ. Law* (by Strahon) 681.

"Thus, he who had sold an immovable thing was privileged for the price, before the creditors of the purchaser and all others, as to the thing sold. So, he who loaned money to a purchaser to pay the purchase price had the same privilege as the seller would have had till he had been paid. He who loaned money to preserve the thing, or to make an improvement of an estate, had a like privilege. Id. 682, 683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement, or creation of an improvement on land. This privilege is thus stated in Domat (page 683, Section 1744):

"'Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of works, and which the seller has for the price of the thing sold.'

"None of these instances, from either the civil or common law, of a charge of preference, are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or material man, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who, by his labor or materials, has benefited the owner, and has acquired, therefore, an interest in the property benefited, to secure his just compensation. In most instances it is well understood that the contractor will employ others tc aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others an independent lien was given to all who should, at the instance of

the owner or his contractor, contribute towards the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' *Edwards* v. *Kearney*, 96 U. S. 595; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith* v. *Parsons*, 1 Ohio, 236; *Weil* v. *State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows

what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Inst. for Savings* v. *Jersey City,* 113 U. S. 506-514, 5 Sup. Ct. 612.

"If, then, this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purpose of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure those who, by their labor or materials, have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another would be fatal to the legislation, as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims, the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor, it is his own fault. That the liability of the owner in respect to building contracts is restrained in some degree

by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or materials at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity, the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive; nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would be futile to them, and disastrous to the owner. A law which has for its basis equitable principles, which in all times and in all ages have had recognition, cannot be arbitrary and oppressive to the straints upon liberty of contract are constantly met with in the legislation of every state. Statutes requiring certain contracts to be in writing or to be witnessed or acknowledged or registered, statutes regulating interest or the time within which rights may be enforced, and statutes exempting property from liability

to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contracts is afforded than the statute upheld by the Ohio Court in *Weil* v. *State,* 46 Ohio St. 450, 21 N. E. 643. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

"The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who, by his labor and materials, had contributed to the betterment of another's estate, was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who, at the instance of the contractor, shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its en-

> actment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder. The decree of the circuit court must be reversed. The demurrer will be overruled, and the cause remanded for answer and further proceedings not inconsistent with this opinion."

This reasoning has the approval of this Court, and this case not adverted to by opposite counsel is conclusive of the validity of that hereunder assailed.

The owner was the Natchez Investment Company; it was the obligee in the bond. As such, it filed the original bill, wherein it averred this obligation upon the part of the appellant to pay, or, if it were mistaken in this obligation of the appellant, then to have adjudged invalid the assignment made by the principal contractor to the New Orleans Bank & Trust Co. The owner required this bond from Burkes, wherefor appellant was paid, and whereby appellant became bound unto the owner for the construction of a building containing the precise material furnished by appellees. Had Burkes, the principal contractor, defaulted the first day after the bond was signed, then thereunder appellant was obligated to complete precisely as Burkes has done, and in completing it would have incurred the obligation for this precise property now therein which was obtained therefor from appelless, and appellant would have been compelled to pay therefor in cash. Each brick laid by these appellees

pro tanto lightened appellant's burden and thereby was a *pro tanto* equitable consideration for payment.

There can be no question as to Burkes and his responsibility when the owner was at pains to see that the contractor and this surety, appellant, were to pay for the *recordation of the lien privilege certificate as well as the required recordation of the contract and bond and its release* (Tr. 16-17), imported from the Louisiana law. It is but proper to assume that the more important obligation to pay subcontractors thereunder to be obtained were specifically undertaken, especially in view of those conditions in the bond whereby appellant was at pains to escape responsibility for (5) destruction by fire, riot, mob, etc.; (6) guarantees of the work specified in the contract, and of its efficiency, its wearing qualities and for maintenance of or repairs thereto; and the payment of any damages or compensation either at common law or under any statute, Federal or State, arising from or growing out of injuries to persons or property; and for failure to procure insurance; and for (7) infringement of patents (Tr., 19, 20).

Where, as here, there is to be the placing by materialmen of their goods upon the land of another, at a contractor's instance, the law has almost universally stepped in and prescribed rights to materialmen.

Dealing with the alleged liberty of contract, this Court in *Hardware Dealers, etc., Co.* v. *Glidden*, U. S. Supreme Court Advance Opinions No. 3, page 65, October Term, 1931, said:

> "Without stopping to examine these contentions, we assume that appellant's freedom of

contract was restricted by operation of the statute, and pass directly to the question decided by the State Court; whether the Fourteenth Amendment precludes the exercise of such compulsion by the legislative power.

"The right to make contracts embraced in the concept of liberty quaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, and unreasonably or arbitrarily exercised, can not be condemned because it curtails the power of the individual to contract. *McLean* v. *Arkansas*, 211 U. S. 539; *Schmidinger* v. *Chicago*, 226 U. S. 578; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *Erie R. R.* v. *Williams*, 233 U. S. 685; *Keokee Cons. Coke Co.* v. *Taylor*, 234 U. S. 224.

Further, he said:

"The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; see *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Ohio ex rel Clarke* v. *Deckebach*, 274 U. S. 392, 397. We cannot assume that the Minnesota Legislature did not have knowledge of conditions supporting its judgment that the

legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

"Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern. See *Fidelity Mut. Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301; that in the appraisal of the loss by arbitration expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding.

"These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators cannot be deemed to be a denial of either due process or equal protection of the laws."

This statute has been in effect in Mississippi since 1918, and has been integrated consistently into the

obligations assumed by these companies in their dealings with the public, and when, as here, in order to obtain for Burkes, the contractor, the right to assign, transfer or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors and materialmen, and to discharge the equity against the owner *Dickson* v. *U. S. F. & G. Co., infra,* this bond was executed, the surety thereon having, under our decisions, vouchsafed to Burkes this right to assign to the New Orleans Bank, may not, having thus obtained from Burkes this right, now assert that thereby this right did not so thus exist.

The holding of the Supreme Court of Mississippi under Section 3, Chapter 128, Laws of Miss. 1918, is, that when the owner and/or materialman are deprived of the rights given by Section 2, which are conceded to be valid, that therefor and thereunder, Section 3 makes such bond so thus given, available. By such holding there is no deprivation of property without due process.

There are no factual elements presented by this record as to any of these appellees. The decisions of the Supreme Court of Mississippi are here, but it does not appear but that before any of the alleged defaults, whereby a discharge is claimed, the material had been in good faith delivered, and that sought by appellant is as to these materialmen an *ex post facto* deprivation by an act of the contractor or owner. Appellees are sought to have their rights taken away by defaults, wherefor appellees are not responsible.

Bonds of this character contain two several separate obligations: One to the obligee, and the other to those who are thereunder to be protected.

In considering this cause on the first appeal, on demurrer, the Supreme Court of the State of Mississippi in *Hartford Accident & Indemnity Company* v. *Natchez Investment Company, Inc., et als.*, 155 Miss. 31, 119 So. 366, page 369, held:

> "* * * Section 2 of the Act is challenged as impairing the right of a contractor to make contracts and to receive the price therefor, and dispose of it, as he sees proper, as a necessary incident to the protection of his business. Of course the Section does not prohibit the subcontractors, journeymen, laborers and materialmen from waiving such right or entering into contracts by which such rights are waived or otherwise provided for, but it does give rights to the subcontractors, journeymen, and laborers and materialmen against the funds due the principal contractor for the protection of their contracts with him, and in furnishing labor and material in carrying out his contract. The Legislature has the power to regulate the right of contract in a reasonable manner, so long as the right to contract is not destroyed or seriously impaired. The effect of the statute before us in the case named is similar to impounding money due to one person by a process of garnishment to the satisfaction of the claims of another person against the owner of such funds, and it has always been, as we understand it, permissible for the Legislature to provide remedies to parties furnishing labor and material, or in selling property, by providing liens

or other proceedings impounding the property or its proceeds."

As reasoned by the Court, the Legislature, having created a lien on right to lien in favor of materialmen and subcontractors, as it had a right to do, the Legislature then proceeded in Section 3 of the Act to provide for the benefit of the principal contractor a means and method by which the principal contractor could release and obtain the discharge of the proceeds of his contract from the effects of that lien.

The Act does not require the owner of the building, the contractor, or any surety to enter into and make the bond provided for in Section 3 of the Act, but does provide that if a bond be given, conditioned to guarantee the faithful performance of the contract, then, in that event, and under those conditions, the lien and lien rights of subcontractors and materialmen are discharged; but in the place of such lien or lien rights the subcontractors and materialmen are given another remedy for the enforcement of the payment to them for material and labor which have gone into the construction of the building, and, being so incorporated in the building, cannot be taken or otherwise charged with any other lien or lien right.

The Bond being given, the subcontractors and materialmen are, willy-nilly, deprived of the substantial and substantive right conferred upon them by Sections 1 and 2 of the Act, and, the Bond being given, such subcontractors and materialmen cannot complain of any disposition that may be made by the principal contractor of any of the proceeds of his contract. This being so, a surety who enters into a bond under the provi-

sions of Section 3 of the Act of its own volition and by the terms of the Act incorporated into its contract, takes from subcontractors and materialmen those substantive rights conferred by Sections 1 and 2 of the Act and offers its own faith and credit to the subcontractors and materialmen in lieu thereof.

Therefore, as the Mississippi Supreme Court has held in this and other cases, Section 3 of the Act is not unconstitutional, because the Act first does not require the Bond to be given in any event, and secondly, does not deprive any contracting party of the right to incorporate in the contract and bond such conditions and provisions as it may see proper—subject, however, to the one condition that, of course, there may not be incorporated in the Bond such conditions, terms and provisions as would nullify the bond as to the rights of subcontractors, laborers and materialmen. Thus to do would be to enable the contractor and surety to gain the advantage of releasing the proceeds of the contract from the effects of Sections 1 and 2 of the Act without in turn conferring upon subcontractors and materialmen the benefits of Section 3 of the Act.

> "The regulations of corporations for the public interest under the police power are valid whether the power to alter the charter has been reserved or not."
>
> (*Troy, etc., R. Co.* v. *Kerr*, 17 Barb. (N. Y. 1854) 581.)

Very stringent regulations of insurance companies have been supported under the police power, although

in such case the Court relied on the theory that, since the insurance company might have been excluded entirely, it could be allowed to write contracts only on such terms as the State might impose, even though they contained an element of hardship.

> "Thus the state may require a deposit of securities (*Paul* v. *Virginia,* 8 Wallace (U. S. 1869) 168; 19 L. Ed. 357); may force them to comply with the State laws in detail (*Hooper* v. *People,* 155 U. S. 648; 39 L. Ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (*Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 43 L. Ed. 552); may make policies valid even if erroneous answers were given, if not fraudulently given (*John Hancock Life Ins. Co.* v. *Warren,* 181 U. S. 73, 45 L. Ed. 755; *Northwestern Mutual Life Ins. Co.* v. *Riggs,* 203 U. S. 243; 51 L. Ed. 168); can regulate the forfeiture of policies for the non-payment of premiums (*N. Y. Life Ins. Co.* v. *Cramer,* 178 U. S. 389; 44 L. Ed. 1116); and can compel an insurance company to file a certificate before contracts. (*Commonwealth* v. *Hock Age Mutual Benefit Association,* 31 Leg. Int. 245; 10 Phila. 554. See, also, *Eagle Ins. Co.* v. *Ohio,* 153 U. S. 446; 38 L. Ed. 779.)"

The statute in question can be further upheld for the reason that it is designed to prevent fraud.

The basis of this law was laid down by the Federal Courts wherein it was decided that the State could compel foreign corporations to deposit securities before doing business within the State. (See *Paul* v. *Virginia,* 8 Wallace 168; 19 L. Ed. 357; *Hooper* v. *California,* 155 U. S. 648, 39 L. Ed. 297.)

Under the same principle residents of a State may have priority in cases of insolvency and the due process of law clause is not thereby violated, although the benefits and immunities of citizens of the United States are thereby abridged. (See *Blake* v. *McClung*, 172 U. S. 239 at 260, 261; 43 L. Ed. 432; *Seely* v. *American National Bank*, 178 U. S. 289; *McGoon* v. *Scales*, 9 Wall. 23; 19 L. Ed. 545; *Frowert* v. *Blank*, 205 Pa. 299, 54 Atl. 1000.)

So too, it has been upheld that the Legislature has ample power to prevent fraud by police regulations in the matter of blue sky laws. (*Hall* v. *Geiger Jones Co.*, 242 U. S. 539; 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stock Yards*, 242 U. S. 559; 61 L. Ed. 493; *Merrick* v. *Halsey*, 242 U. S. 568; 61 L. Ed. 498.)

As stated and dealt with in Mott in his "Due Process of Law"—Bobbs-Merrill Company, Publishers (1926), the Courts will sanction Legislative interference with private rights when there is a fair balance between the advantage which the public will derive from the statute and the degree of interference with private rights which it involves.

Where the degree of interference is slight the Courts, with unerring uniformity, will uphold the law as beneficial to the public, so where there was merely created a State fund which was held as a protection to the public against bankruptcy, etc., the Supreme Court of the United States has pointed out that all that was taken was the use of the money for a short time, a consideration which was negligible in view of the great public convenience. (Sinking Fund cases, 99 U. S. 700 at 721; 25 L. Ed. 496; *Thornton* v. *Duffy*, 254 U. S. 361; 65 L. Ed. 304.)

In the instant case the Legislature of Mississippi has seen fit to enact the legislation here under attack, and it was more familiar with the facts and circumstances which surround the subject of bonds and building contracts and with the necessities and occasion of the enactment of the laws in question than can one be who is a stranger to the circumstances and facts surrounding building operations in this State under the law previous to the enactment of the legislation in 1918.

As held in *Falbrook Irrigation District* v. *Bradley*, 164 U. S. 112 at 160; 41 L. Ed. 369, this legislative determination of issues in question concerning legitimacy of the legislative object will not be disturbed by the Court unless there has been a great abuse, and such determination goes beyond all reason.

> "The people of California and the members of her Legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and occasion for the irrigation of the lands, than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the State Courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State.
>
> "For these reasons, while not regarding the matter as concluded by these various decisions, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thoughts of the Court of that State on this question."
>
> *Falbrook Irrigation District* v. *Bradley*, *supra.*

So too, it has been held that the Legislature, in determining upon the passage of a law, may make investigations which the Court cannot. (*People* v. *Smith*, 108 Mich. 527; 66 N. W. 382; *Morris* v. *Columbus*, 102 Ga. 792, 30 S. E. 850; *State* v. *Main*, 69 Conn. 123, 37 Atl. 86.) A reading of the cases as pointed out by Mott in his work, *supra*, is to the effect that, during the second decade of the Nineteenth Century, the Courts concluded that if they were to properly judge the validity of the legislative object they must have some means of knowing the facts in the situation. Frequently these facts were local, and for the Courts to have an understanding of local situations was almost impossible.

For that reason this Court refused to go behind the legislative determination of pool hall regulations in the year 1912 in the case of *Murphy* v. *California*, 225 U. S. 623; 56 L. Ed. 1229, the Court holding that where the statute prohibited pool halls this Court would refuse to take up the question of whether pool halls were detrimental to public morals and that that was for the Legislature to decide and that this Court cannot go behind their findings and inquire into local conditions.

And, again, this Court refused to go into the question of regulation of competition to prevent unfair practices where the statute had prohibited sales at one place at a lower figure than at another where the purpose was to drive out competitors. (*Superior Lumber Co.* v. *South Dakota*, 226 U. S. 157; 57 L. Ed. 164.)

Shortly thereafter this Court laid down the doctrine that the burden of proof rests upon those who attack the validity of the object of a statute, declaring that,

> "The burden is on him who attacks the legislation and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that public welfare is not subserved by the legislation." (*Erie* v. *Williams*, 233 U. S. (1914) 685 at 699, 58 L. Ed. 1155.)

> "Where the legislation has usage to support its position it is much stronger" (*People ex rel.* v. *Murry*, 149 N. Y. 367 at 376; 44 N. E. 146; *People* v. *Schweiner*, 214 N. Y. 395; 108 N. E. 639).

In Mississippi the Legislature had knowledge as to the abuses which had gone on in the building trade and in the matter of the deprivation of rights of laborers and materialmen in the assigning of the contract price by the chief contractor.

These abuses were corrected by the Legislature in the legislation here under attack and the public need will be presumed by this Court, and the frauds which heretofore ran rampant throughout the State were blocked by the legislation now being sought to be overthrown.

Mr. Justice Clark affirmed the doctrine in the Chicago Billboard case when he declared that the Courts were disposed to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the high court of the State (*Thomas Cusack* v. *Chicago*, 242 U. S. 526, 61 L. Ed. 472).

The doctrine was again affirmed in *Hutchinson Ice Cream Company* v. *State*, 242 U. S. 153, 61 L. Ed. 217.

And again in the Queens Gas Company case, wherein the Court refused to review the facts, or even the reasonableness of an administrative order (*N. Y. ex rel McCall*, 245 U. S. 345, 62 L. Ed. 337).

The same principle was reaffirmed by this Court by Mr. Justice Day in the municipal fuel yard case, *Jones* v. *Portland*, 245 U. S. 217 at 221, 62 L. Ed. 252, wherein he as the organ of the Court said:

> "While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this Court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

Mr. Justice McKenna rested the case of *Bunting* v. *Oregon* in no small degree on the same principles (242 U. S. 426, 61 L. Ed. 830).

Mr. Justice Holmes in the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 256, said:

> "If the character or effect of the article so intended to be used be debatable, the Legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of the judges, upon the issue which the Legislature has decided."

The same proposition formed the chief justification given by Mr. Justice Day in upholding the non-partisan legislation of North Dakota, wherein the Court says:

> "What was or was not a public use was a question concerning which local authorities, legislative and judicial, had special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the State, declaring a given use to be public in its nature, would be accepted by this Court *unless clearly unfounded*" (*Green* v. *Frazier*, 253 U. S. 233 at 242; 64 L. Ed. 878).

It, therefore, must be concluded, that if presumption is to be engaged in to support the law and only clear and undemonstrated usurpation of power will authorize police interference with legislative action (*Green* v. *Frazier*, 253 U. S. 233; 64 L. Ed. 878). Other cases in which the Courts have deferred to the Legislature are: *Dominion Hotel Co.* v. *Ontario*, 249 U. S. 266; 62 L. Ed. 597 (Mr. Justice Holmes declared the 14th Amendment is not a pedagogical requirement of the impracticable) page 268; *U. S.* v. *Standard Brewery*, 251 U. S. 210, 64 L. Ed. 209; *State* v. *Cantwell*, 179 Mo. 245; 78 S. W. 569 affirming *Cantwell* v. *Mo.* 199 U. S. 602, 50 L. Ed. 329; *N. Y. ex rel.* v. *Hesterberg*, 211 U. S. 31; 53 L. Ed. 75; *Parrott* v. *Benson*, 114 Wash. 116, 194 Pac. 986; *State* v. *Pitney*, 79 Wash. 608 at 612; 140 Pac. 918; *Securities Savings Bank* v. *California*, 263 U. S. 282; 68 L. Ed. 301.

In U. S. F. & G. Co. v. *United States*, 191 U. S. 246, 48 L. Ed. 246, it is said:

> "We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not

within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States use of Heise* v. *American Bonding & T. Co.*, 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking.

"Bonds containing the covenant in question are not common, though they have sometimes appeared in the state courts, and the construction here given them has been generally adopted (*United States use of Snyder* v. *Hazard*, 53 App. Div. 410, 65 N. Y. Supp. 1051), although these cases have generally turned upon the question whether the rights of the materialmen were affected by a change made in the contract by the principals. *Dewey* v. *State*, 91 Ind. 173; *Conn* v. *State*, 125 Ind. 514, 25 N. E. 443; *Steffes* v. *Lemke*, 40 Minn. 27, 41 N. W. 302; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper*, 46 Neb. 644, 65 N. W. 796; *Griffith* v. *Rundle*, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199."

Compare *Pingrey on Suretyship & Guaranty*, Sec. 112, p. 139; *Doll* v. *Crume*, 59 N. W. 806, 41 Neb. 655; *Federal Union Surety Co.* v. *Commonwealth*, 129 S. W. 335, 139 Ky. 92; *Forburger Stone Co.* v. *Lion Bonding & Surety Co.*, 170 N. W. 897, 103 Neb. 202; *Standard*

Salt & Cement Co. v. *National Surety Co.*, 158 N. W. 802, 134 Minn. 121.

Further, the Courts have been at pains to hold that, with a corporate surety, being thus paid, there must be proof of damage before discharge. Herein hereof there is none. *Atlantic Trust & Dep. Co.* v. *Laurinburg*, 163 Fed. 690, 695; *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958, 963; *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881, 884; *Atlas Assurance Co.* v. *Lawrence*, 34 Fed. (2d) 401, 404; *West* v. *Detroit Fid. & Surety Co.*, 225 N. W. 675, 118 Neb. 554; *Philadelphia* v. *Fid. & Dep. Co.*, 80 Atl. 62, 63, 231 Pa. 208; *U. S. F. & G. Co.* v. *United States*, 178 Fed. 692; *City of Montpelier* v. *National Surety Co.*, 97 Vt. 111, 122 Atl. 488; *People* v. *Traves*, 154 N. W. 130, 188 Mich. 415; *American Surety Co.* v. *Smith*, 130 So. (Fla.) 442; *Johnson* v. *Casualty Co.*, 133 So. (Fla.) 850.

Note that this foreign Company was at pains, directly in the teeth of our statutes, to stipulate that "no action, suit or proceedings shall be had or maintained against a surety under this bond unless it shall be brought or instituted and process served upon the surety within six months after the contract and in no event after six months subsequent to the date, time or period fixed in the contract for the completion of the work specified, therein" (Tr. 20, Par. 9).

Section 2294, Code 1930; *Lasky* v. *Southern Express Co.*, 92 Miss. 268, 45 So. 869; *Standard, etc.*, v. *Broom*, 111 Miss. 409, 71 So. 653; *Sovereign Camp, etc.*, v. *Miller*, 125 Miss. 502, 87 So. 892; *Stuyvesant* v. *Smith*, 135 Miss. 585, 99 So. 575.

Counsel's declaration that "the parties were studiously attempting to draw a special contract which would not impose upon the surety the liability imposed under Section 3 of the Statute" is not accurate, for this bond, as is, with this contract, as is, comes from Louisiana where the obligation to pay is as above indicated.

If, for the purposes of this argument, we should admit that the bond here is such a bond as was contemplated by the statute, the fallacy in the argument for appellant is that it fails to note that, *quoad* the landowner, the obligation to pay the materialmen could not be by the landowner defeated, nor could it be defeated by the contractor; there were two independent obligations, the one to the materialmen that "such bond shall also be subject to the additional obligation that the contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; the other, in the event such bond does not contain any such provision for the payment of the claims of persons furnishing labor or material under such contract, such bond shall nevertheless inure to the benefit of such persons furnishing labor or materials under said contract, the same as if such stipulation had been incorporated in said bond," namely, the stipulation to make payment, which stipulation as an independent covenant has here been established to exist under the law of the State of Mississippi.

This statute, as written, was construed in this case and all herein held was that this particular bond, with the particular and express provision there inserted did constitute such a bond as was contemplated whereon

the materialmen might recover. The court has not as yet denied the right to the landowner to take a bond, but this particular landowner did take this bond, and in taking, thought, as his bill averred, that he had that specifically which the Supreme Court held he had received. The only attempt at denial is as to a surety, who signed the bond, giving the right *assumed by the landowner to be given.*

Counsel is beside the mark in claiming that the landowner here did not understand that under this bond the obligation to pay existed.

Complainant further averred and charged that the parties herein named as furnishing material in connection with said project No. 640 to said contractors "have not been paid and are entitled to recover the amount owing to them by said contractor and *to have judgment for said amount on said bond,*" but in the alternative, if the bond be not such a performance bond, then to have the assignments to the New Orleans Bank vacated. The appellant is in serious error when it seeks to assert that the landowner here did not intend to contract and did not believe that it had contracted for a performance bond for the payment of the materialmen. The original bill here filed so shows.

The amount of the bond in this case is $316,822.00, the precise amount of the contract, and counsel is in error in asserting that more than the amount of this bond might be recovered. Compare Section 758, Code 1930; *Parsons, etc.*, v. *Furr*, 110 Miss. 795, 70 So. 895; *National Surety Co.* v. *Lee*, 125 Miss. 517, 88 So. 7.

Counsel's contention that there was an express condition that it should not inure to the benefit of materialmen, the statute was unconstitutional for its abridgment of the liberty of contract (Brief 19), is answered by the observation of *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d), 458:

> "This provision is plainly in conflict with the condition in the bond just discussed and with the law applicable thereto as stated. By the first condition the bond company has provided protection for a class of persons who, under the law, may sue; yet by the last provision it is provided they may not sue. Both cannot stand. Surety contracts of this character, with a paid surety, are regarded as in the nature of insurance contracts, and will be most strongly construed against the surety. *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 1115, 298 S. W. 1032, and cases cited. Applying this rule to the contract in question, the third clause in the bond must give way to the first and be given no force or effect."

It is further answered by a correct interpretation of the bond. The facts presented to the Supreme Court of Mississippi are not presented to this Court insofar as these appellees are concerned; the record, as now presented, nowhere shows that the owner paid the contractor in notes instead of in cash, and that question cannot be here argued, especially, as no damage was shown to have therefrom resulted.

Counsel is in error in stating the extent to which the Supreme Court of Mississippi has limited the rights of the respective parties to this litigation. It has gone

no further than to determine this particular case under this particular bond, and thereby there has been no ruthless disregard of private rights.

Counsel's dissertation as to who can give these bonds, and the number of contractors, with deference, has no foundation in fact, for that wherein Mississippi was interested was, when the material of its citizens was placed upon land, and thereby the value of such land was enhanced, that the surety for the performance of the contractor should be responsible to the materialmen. Being obligated to perform the contract, should the principal therein fail, each contribution of material made was an advance to the surety whereby that for value by the surety guaranteed, was in part done, and that now herein sought is the ungracious contention that, when the materialmen have by their contributions aided the performance of that guaranteed by the surety and wherefor the surety was unconditionally bound, there will be to them no compensation for that from them thus taken by the surety.

As demonstrated by Mr. Justice Lurton in the *Great Southern Hotel Company case, supra,* approved by this Court in 193 U. S. 532, 48 L. ed. 778, responsibility is unquestioned and imposed upon this surety who thus used for its exoneration, the material contributed by these appellees. Had they not contributed this material—this labor, then to perform appellant would of necessity have been compelled to go elsewhere thus to obtain that so thus requisite, and when under the agreement appellees had so thus to it furnished value, it was competent for the Mississippi Legislature under the precise ruling approved by this Court to im-

pose therefor an obligation on that surety which had undertaken to do that which was thus aided, abetted—rendered possible, by the material belonging to appellees.

The statutory requirement existed when the appellant executed this bond and the law of Mississippi, as thus existent, was thereby thereinto written and not only written, but agreed to, and having been agreed to, no complaint may be thereof made. *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 660, 67 L. ed. 1182; *Pennsylvania, etc., Co.* v. *Gold Issue, etc., Co.,* 243 U. S. 93, 61 L. ed. 610.

Counsel states truly: "The surety had the right to come in and complete the work." (Brief page 20.) This was its obligation. When in order to fulfill that obligation the appellees contributed their material, they thereby, *quoad* the surety furnished value for the obligation now exacted, and if it be that at a subsequent time, without fault upon the part of these materialmen, there was a failure by the contractor to do that which he should *quoad* the surety, therefore these appellees are not in any way therefor responsible. *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.,* 163 La. 1, 111 So. 470. When one of two innocent persons must suffer, the law may direct which will bear the burden, and this election so thus made in this cause by the Statute of Mississippi is reasonable. These appellees are not interested in anything other or further than that under and with the consent of owner, contractor, and appellant, they furnished material to the extent wherefor a decree

was rendered. That material was integrated into a building which the surety was bound to see completed and to save harmless the landowner. Therefore, to the surety that thus done by appellees inured, and the point here at issue is may Mississippi exact of the appellant, thus receiving, value for that thus received.

As said in *Lockland Lumber Co.* v. *Robinson,* 157 N. E. (Ohio) 376, mechanics lien statutes do not create rights but merely afford additional remedies for rights in equity theretofore existing. "Natural equities in favor of materialman as creditor of the contractor give reason and constitutional validity to such a provision."

This Court cannot consider the constitutional right of the landowner; he does not complain, but avers the obligation of the surety to do that by the Supreme Court of Mississippi to him adjudged to have been done. The surety has our goods towards the fulfillment of his contract, rendered immovable and impossible of being again restored, and it is just, having agreed as he here did to pay, that the statute make him do that which he has covenanted.

The liberty of contract is not here sought to be taken away. We subscribe to every decision cited by appellant from this Court; but that which appellant overlooks is that, while there is a liberty of contract, when a statute, as here, deals with the doing of justice, and only vouchsafes, as against one bound to construct a building, a decree for that contributed without fault by the appellees, that thereasto the surety so thus giving bond has no cause to complain.

As pointed out in *Williams* v. *Riley*, 280 U. S. 78, 80, 74 L. ed. 175, 178:

> "The Federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the Federal or state Constitution. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' "

Ohio Oil Co. v. *Conway*, 281 U. S. 46, 74 L. ed. 775; *White* v. *Johnson*, 282 U. S. 367, 75 L. ed. 388; *American Bond & Mortgage Co.* v. *United States*, 282 U. S. 374, 75 L. ed. 395; and as pointed out, constitutional objections to a statute, which may exist, if given a wider application than it is necessary to give in the decision of this particular case, is not open to consideration herein. *Young Co.* v. *McNeal-Edwards Co.*, 283 U. S. 398, 75 L. ed. 1140. As pointed out in *State Board of Tax Comrs.* v. *Jackson*, 283 U. S. 527, 75 L. ed. 1248, the fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it. Here, with the receipt by the appellant of appellee's property, donated to perform its contract, appellant may not, having that property now in its possession, refuse to pay the reasonable value thereof. The fact that the statute may work a peculiar personal hardship does not render it unconsti-

tutional. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 75 L. ed. 482. That the State, in the matter of protecting materialmen, has a broad discretion in the exercise of its power of regulation must be admitted. *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264.

In *O'Gorman* v. *Hartford Fire Ins. Co.,* 282 U. S. 257, 75 L. ed. 327, the Court declared:

> "The business of insurance is so far affected with a public interest that the state may regulate the rates (*German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915C, 1189, 34 S. Ct. 612), and likewise the relations of those engaged in the business (*La Tourette* v. *McMaster,* 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; *Stipcich* v. *Metropolitan L. Ins. Co.,* 277 U. S. 311, 320, 72 L. ed. 895, 899, 48 S. Ct. 512). Compare *McCarter* v. *Firemen's Ins. Co.,* 74 N. J. Eq. 372, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. * * *
>
> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist

> in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of facts tending to show unreasonableness."

The principle here involved, namely, the obligation of the surety to pay when the property of the appellees was devoted to that wherefor the surety was bound, was recognized and held constitutional in *Staten Island Rapid, etc.*, v. *Phœnix I. Co.*, 74 L. ed. 126, 281 U. S. 98. The business of appellant being affected with a public use, even under the 5th Amendment, the regulation of charges did not deprive it of liberty or property without due process. *Tagg Bros.* v. *United States*, 280 U. S. 420, 74 L. ed. 524.

The landowner may well object to living in a house which was built with materials that were not paid for. This was recognized by this Court in the *Great Southern Case*, and furnishes an additional reason why this act is constitutional.

Appellant, having in possession the materials of appellees in virtue of installation in that wherefor appellant was normally bound, is estopped, by this constructive receipt, which in the normal travel advantaged it, to deny therefor responsibility when the appellees are without fault. Compare *Hightower* v. *Bailey*, 108 Ky. 198, 56 S. W. 147, 22 Ky. Law Rep. 88, 49 L. R. A. 255, 94 Am. St. Rep. 350.

Under Section 2, Chapter 128, Laws 1918, if the principal contractor desires to "assign, transfer, or otherwise dispose * * * of the contract or pro-

ceeds thereof, to the detriment or prejudice of the subcontractor, materialmen or laborer," then he may not do so, unless the bond provided is given.

If the master workman or contractor does not assign, transfer or otherwise dispose of either the contract or its proceeds to the detriment or prejudice of the subcontractor, materialman or laborer, he may contract as often as he pleases, without bond; that is to say, if he forthwith applies the total proceeds of the contract to the liquidation of his individual liability to subcontractor, laborers, materialmen, the statute does not affect him in any way.

It is when he desires to exercise a right, viz., to assign, transfer, or otherwise dispose of these amounts to the prejudice or detriment of those justly entitled thereunto, that the statute says, in order to obtain this right, he must execute a bond to protect those justly entitled.

The United States has adopted precisely this same protection. *United States* v. *American Surety Co.*, 200 U. S. 200, 50 L. ed. 441. The Supreme Court of Mississippi gives the same effect to our statute. *Alabama Marble Co.* v. *U. S. F. & G. Co.*, 111 So. 573, 146 Miss. 414.

In *Mankin* v. *United States*, 215 U. S. 536, 54 L. ed. 317, it was held, specifically, to be constitutional to impose this liability in favor of subcontractors, even though the full amount due had been paid.

In *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 380, 61 L. ed. 1211, the Court said:

> "As the basis of recovery is supplying labor and material for work, he who has supplied

> these to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *United States*, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174."

Counsel seeks to distinguish these cases on the ground that the United States, or the state, has plenary power to prescribe conditions of contract when the sovereign is contracting; but, insofar as the contractee is concerned, furnishing materials for the building where the land is owned by other than the contractor, the right, *quoad* contractee, is precisely similar to that here involved and here sustained. *Dickson* v. *U. S. F. & G. Co.*, 117 So. 248, 150 Miss. 864, *supra*.

Compare *Ætna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (Ky.) (2d) (1931) 234 (a companion case which was followed in *Ramsey* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420), where it was said:

> "It is argued that the distinction in the decisions depends upon the character of the subject-matter of the contract, and, when the contract concerns a public improvement, as here, it will be presumed that the bond was intended for the benefit of laborers and materialmen. It is said that they are unable to assert a lien on public property, and for that reason the bond is provided to supply the rights ordinarily given by lien laws. In amplification of the argument, it is insisted that, when the subject-matter of a contract is a private structure, the lien laws of the state afford ample remedy, and it is unnecessary to resort to a bond for their protection. But such distinction is artificial and

drawn from the accidental circumstances of the cases." * * *

"The same motive that prompted the passage of material and labor lien laws is sufficient to suggest the expediency of a surety contract for the benefit of those who perform labor or furnish material. A private owner may well desire to be free from the vexation of claims or suits, and to that end may require a bond to protect him against vexation as well as liability. It is conceivable that a private owner might wish not to have upon his property a structure composed of materials or erected by labor not paid for by the contractor. So, if the contract is sufficient in its terms to manifest an intention that the contractor shall pay for the labor and material, it is a valid obligation and enforceable in favor of any person for whose benefit it may have been executed."

The rule is that if it were constitutional to insert the name of these appellees as payees, then it would be constitutional to insert the provisions under which the obligation was to them payable, when, voluntarily, this corporation made the obligation for a valuable consideration. *Philip Carey Co.* v. *Maryland Casualty Co.*, 206 N. W. 808 (Iowa, 1926), where the court said:

"(3) Where a statutory bond is given, the provisions of the statute will be read into the bond. *Asberg* v. *Ass'n*, 143 Minn. 354, 173 N. W. 708; *People* v. *Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *School District* v. *Construction Co.*, 87 Or. 132, 169 P. 507, 788; *Nye-Schneider-Fowler Co.* v. *Roeser*, 103 Neb. 614, 173 N. W. 605; *United States ex rel. Hoffman* v. *Quincy*,

4 Wall (71 U. S. 535, 18 L. ed. 403); *Northern Pacific R. Co.* v. *Wall*, 241 U. S. 87, 36 S. Ct. 493, 60 L. ed. 905; *Gill.* v. *Paysee* (Nev.) 266 P. 302; *Forgarty* v. *Davis, supra; Faurote* v. *State*, 110 Ind. 463, 11 N. E. 472; *Lowe* v. *City*, 4 Okla. 287, 44 P. 198; *Iddings Co.* v. *Construction Co.*, 104 Neb. 124, 175 N. W. 643, again, and aside from this well recognized rule, it is the plain requirements of the statute itself that the provisions and requirements of the act shall not be modified and annulled by statutory provisions in the bond."

Compare *Peoples* v. *Metropolitan Surety Co.*, 105 N. E. 99 (1914, N. Y.); *American Surety Co.* v. *Small Quarries*, 120 S. E. 617 (1923 Ga.).

Consider Section 2888 of Code Mississippi 1930, providing:

"Conditions of Official Bonds.—The bonds of all officers required to give bond shall be conditioned in the following form, to-wit:

" 'Whereas, the above bound A B was duly elected (or appointed) to the office of ——, on the — day of —— for the term of — years, from the — day of ——; therefore, if he shall faithfully perform all the duties of said office during his continuance therein, then the above obligation would be void.'

"But the failure to observe the form herein prescribed shall not vitiate any official bond; and all official bonds shall be valid and binding in whatever form they may be taken, except so far as they may be conditioned for the performance of acts in violation of the laws or policy of the state; and whether in the proper penalty or without any penalty, or whether correct or incorrect in its recital as to the term of

office or otherwise, or whether properly payable or whether approved by the proper officer or not approved by any, or if irregular in any other respect, such bond, if delivered as the official bond of the officer to the full penalty, or if it has no penalty, to the full penalty of the bond which might have been required."

This provision has been in effect since the Code of 1871, and has been enforced by divers decisions of the Court, *Cox* v. *Ross*, 56 Miss. 481; *State* v. *Smith*, 87 Miss. 551, 40 So. 23; *Adams* v. *Williams*, 97 Miss. 113, 52 So. 865.

When, as here, the law prescribes what the penalty shall be, what the conditions shall be, it has been the holding of our State that a blank piece of paper properly signed was a valid bond. Furthermore, by Section 5185, Code of 1930, the legislature specifically provides the form of the "mortgage clause." Under *Bacot* v. *Phenix Ins. Co.*, 96 Miss. 223, 60 So. 729, this section automatically writes itself into every insurance contract. *Etna Ins. Co.* v. *Cowan*, 111 Miss. 473, 71 So. 746.

In the case at bar, the surety company has specifically contracted as a surety company doing business in the State of Mississippi, and is there engaged in this business, as a part and parcel of the modern protection, demanded under the name of insurance, the power of the State has become paramount to regulate and to integrate into this bond as into a policy, all of those things requisite and necessary to protect the citizen. This is a part of the insurance business, and this bond is given pursuant to permission granted to this company when it came into Mississippi, and it

agreed specifically and definitely that it would be subject to the Department of Insurance. Section 5129, Code of 1930.

Similar statutes exist elsewhere. Compare *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574; *Rio Grande Lumber Co.* v. *Darke,* 167 Pac. 241, 1918 L. R. A. 1193.

A statute requiring the owner to take a bond, and making him liable in case one was not taken, has been in effect in Louisiana for a long time, and, as pointed out in *McDonald* v. *H. Gas & Oil Co.,* 2 La. App. 241, where the owner, in a contract, does not require a hundred *per cent* bond, Act No. 139 of 1922 does not apply. Bond Act No. 229 of 1916 does. See, also, *Baton Rouge Sash & Door Co.* v. *Deceur,* 2 L. App. 129; *Joubart* v. *U. S. F. & G. Co.,* 3 La. App. 525.

As pointed out in Tennessee, *Cole Manf. Co.* v. *Falls* (1891), 80 Tenn., 16 S. W. 1045, where a statute required the owner to pay a claim, in excess of the amount due on the contract price, in favor of materialmen, the court declared:

> "Double payment does not follow as a necessary legal consequent in any case. In every instance, the owner may fully protect himself by withholding the whole or a sufficiency, of the price agreed upon, from the original contract, until after the expiration of thirty days, or he may see to it, that the subcontractor and materialmen are paid as the work progresses, or he may indemnify himself by bond as prescribed in the 3rd section of this act."

In Kansas, Code of 1925, Section 1401, a lien is given and in Section 1412 it is provided that the con-

tractor or owner mentioned in this may execute a bond to the State of Kansas conditioned for payment of all claims which might be a basis for lien * * * and when same has been filed, no lien, as herein provided for, shall attach. This statute has been in effect for many years, and has been treated as valid.

Under the Iowa Code, Section 3093, substantially, similar provisions have been made.

In California, *Roystone Co.* v. *Darling,* 171 Cal. 526, 154 Pac. 15 (1915), approved in *Roberts* v. *Spires,* 232 Pac. 708, 195 Cal. 267, construed Section 1163 (1911) which described two classes of liens. One class consists of liens in cases where the bond has not been filed, in which case the state of accounts between the owner and contractor, and even the contract price, are immaterial to the lien, except as to the contractor. The other class consists of all cases in which the proper bond and contract are duly filed.

This *Roystone case* is reaffirmed in the case of *Hollenbeck* v. *Amweg,* 170 Pac. 148 (1917, 177 Cal. 159), in upholding the constitutionality of the above statute, wherein the Court said:

> "It is further urged that the provisions exempting the owner from liability beyond the contract price if he file a bond and making him liable for liens to the extent of the value of labor and materials if he does not provide such bonds is in violation of the constitutional inhibitions of the imposition of penalties by legislative enactment. The Constitution (Sec. 15, Act 22) guarantees a lien to mechanics and materialmen extending to the full value of all labor and materials furnished. But the Legislature may,

> under authority given by constitution, provide certain conditions upon companies with which the owner may restrict recovery to the sum mentioned in the contract. Such provision does not impair any existing right of the owner—does not, in short, penalize him—but the effect is to confer a right not previously existing by which the liability may, under certain circumstances, be curtailed. *Stenson Mill Co.* v. *Nolan,* 5 Cal. App. 754, 91 Pac. 262."

There is, also, a similar provision in the Texas constitution. 40 *C. J.*, 42.

The rule in California goes much further than it is essential to go in Mississippi. In the instant case, the bonds specifically provide for a liability, and even in the State of Texas they would be perfectly valid. See *Fife* v. *Indemnity Ins. Co.,* 283 S. W. 645.

In *Stewart* v. *Brewster,* 284 S. W. 53 (1926 Ark.), where it was contended a materialman could not recover on bond given by contractors to owner, because said materialman had not filed his claim for a lien as Sec. 6922 of C. & M. Digest required, the court held in overruling objection and construing the statute:

> "It will be observed that it is not obligatory upon the owner of the improvement to require the principal contractor to execute a bond. He may do so or not, as he deems to his interest. Likewise, the contractor is not required, by virtue of the law, to execute a bond. He may refuse to do so. It is entirely a matter between the contractor and the owner as to whether the bond provided by statute shall be executed. But, where such bond is required by the owner and executed by the principal contractor, then

the persons for whose use and benefit the bond is executed (Sec 6906, *supra*) must look to the bond as their security for the payment of their claims and not to a lien on the improvement. In other words, where the bond provided for under 6912, of C. & M. Digest, is not executed those who are given a lien under Sec. 6906, *supra*, must comply with the provisions of Sec. 6922, *supra*, in order to avail themselves of the benefit of such lien; but if the bond is executed as provided by Sec. 6912, *supra*, then the parties having claims, which might be the basis of liens, do not have to comply with the provisions of Sec. 6922, *supra*, in order that they may establish and obtain the payment of their claims. They must resort to the bond. The language of Sec. 1, of Art. No. 446, of Acts of 1911, Sec. 6912, *supra*, shows that where the bond is executed pursuant to that section the persons otherwise entitled to liens are no longer entitled thereto, and hence would not have to comply with the provisions of Sec. 6922, *supra*, where the bond is executed, *ipso facto*, the provisions relating to liens on improvements are superseded and no lien can attach."

See *Accident & Indemnity Co.* v. *Knox Co.*, 132 Atl. 261 (Ky. 1926), where it is said:

"This Court has also decided on numerous occasions that those furnishing labor and material could recover on a contractor's bond where there was a statute or ordinance requiring that they should be protected by the bond. *So. Md. Bank* v. *Nat. Surety Co., supra; American Fidelity Co.* v. *State*, 109 A. 99, 135 Md. 326; *Baltimore* v. *Casualty Co.*, 126 A. 880, 146 Md. 508, 513; *American Fidelity Co.* v. *State*, 97 A.

12, 126 Md. 50. In the case last cited the Court quoted with approval the statement found in an exhaustive note to *Knight & Jellison Co.* v. *Castle*, 27 L. R. A. (N. S.) 573.

Again, *Independence Trust Co.* v. *Porter*, 132 S. E. 806 (N. C. 1926), says:

> "On these, the facts chiefly relevant, we think the demurrer as it relates to the second cause of action was properly overruled. Undoubtedly, the laborers, had they not assigned their claims would have been entitled to maintain an action on said bond, and we think it must be held, in keeping with the general trend of authorities on the subject, that the claims of laborers and materialmen may be assigned without losing the protection of the bond given and intended for their benefit. *Title Guaranty & T. Co.* v. *Crane*, 31 S. Ct. 140, 319 U. S. 24, 55 L. ed. 72; *Bank* v. *Casualty Co.*, 161 P. 475, 93 Wash. 635, Ann. Cas. 1918 D, 645.
>
> "Here the bond in suit was intended to perform a double purpose: (1) To insure the faithful performance of all obligations assumed by the contractor toward the state highway commission, (2) to protect third persons furnishing materials or performing labor in and about the construction of said roadway. *Plyler* v. *Elliott*, 131 S. E. 306, 191 N. C. 49; *Town of Cornelius* v. *Lampton*, 128 S. E. 334, 189 N. C. 714. In its second aspect, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor or materials they furnish or supply to enable the principals in the bond to carry out its contract with the state highway commission. *United*

States v. *Natl. Surety Co.*, 92 F. 549, 34 C. C., 526."

Again, in *Yawkey-Crowley Lumber Co.* v. *Sinaiko*, 206 N. W. 976 (Wis. 1926):

> "That the claims of those whom the owner paid for labor and material did not ripen into formal mechanics' liens so as to comply with the phrase in the contract concerning the bond and relating to such mechanics' liens is not at all material or controlling or in any way limiting the liability of the surety. Upon the payment by the owner of the obligations of the contractor for labor and material left unpaid by him, such contractor, the owner clearly became subrogated to the rights of those whose labor and material were thus paid for as against the contractor and his surety on this bond. That such a bond does create an obligation in favor of third persons furnishing labor and material to such contractor has been too often held to now need discussion. *United States Gypsum Co.* v. *Gleason*, 135 Wis. 539, 543, 116 N. W. 238, 17 L. R. A. (N. S.) 906; *R. Connor Co.* v. *Ætna Indemnity Co.*, 138 Wis. 13, 18, 115 N. W. 811 (in which is distinguished the case relied upon in the court below of *Elec. A. Co.* v. *United States F. & G. Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 800; *Warren Webster & Co.* v. *Beaumont Hotel Co.*, 151 Wis. 1, 10, 138 N. W. 102; *Concrete Steel Co.* v. *Ill. Surety Co.*, 163 Wis. 41, 47, 157 N. W. 543; *Builders' L. & S. Co.* v. *Chicago B. & S. Co.*, 167 Wis. 167, 170, 160 N. W. 320; *Building Cont. L. M. L. Ins. Co.* v. *Southern S. Co.*, 185 Wis. 83, 200 N. W. 770.

"Under the plain language of the bond, that the obligation of the surety is that the contractor will pay all the amounts due for labor and materials, required of him under the contract, as well as the condition that there shall be full and complete performance of the contract, which by its terms in effect, requires the same thing, we can see no escape from liability of the surety for any amounts, not in excess of the sum of $8,000, which were properly paid by the owner in excess of the contract price in the completion of the work. That here was a grafuitous, as distinguished from a paid, surety, cannot permit the ignoring of unambiguous language such as is here presented in the bond itself. There is here no opportunity to indulge in strict or liberal construction; it permits but of plain construction."

See *Rio Grande Lumber Co.* v. *Darke*, 50 Utah 114, *supra.*

Then, so far as this provision of the bond is concerned, substantially similar bonds in public contracts have been made effective by the Supreme Court of Mississippi in *U. S. F. & G. Co.* v. *Yazoo County*, 110 So. 780, 145 Miss. 378.

The case here is supported by the rule of *Surety Co.* v. *Hall Miller Co.*, 104 Miss. 626, 61 So. 700, where the Court said:

"Taking it as a cold-blooded business proposition, this clause in the bond would naturally encourage subcontractors of the best sort to take contracts to do certain parts of the work; it would tend to prevent the abandonment of the

> work by mechanics not promptly paid their wages by the contractors, who might be suspected to be of doubtful financial solvency; it would procure the best work and material, and the prompt services of all workers and sub-contractors; and all of this would redound to the benefit of the public. It must be borne in mind that the mechanics, materialmen and laborers could have no lien upon the building, and that the trustees, representing the state, would not be bound to reserve money with which to pay their claims; but they would have to depend upon the contractor alone. Taking these things into consideration, the bond, in a way supplied the place of the mechanics' lien law, and thus gave an additional security to all persons working upon this building and supplying material therefor; and this alone was, in our opinion, of the highest importance to the State."

This principle would be applicable to public and private contracts.

Again, we cannot but reiterate that the agreement in this case was properly determined by the State Supreme Court as a State question, and to that end we rely, with confidence, upon the interpretation of the Kansas Court in *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kan. 1917), 163 Pac. 1076, 100 Kan. 28, where that court construed a bond far less express than this one to vouchsafe payment to materialmen. Compare also *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 851; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543.

Point IV.

Should the Court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common law obligation for judgment rendered.

> "It is only when a decision on the validity of a statute is necessary to the determination of the cause that the same will be made" (*State* v. *Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Allen* v. *State of Ga.*, 166 U. S. 138, 41 L. Ed. 951; *Sully* v. *American Natl. Bank*, 178 U. S. 289; 44 L. Ed. 1072).

The Mississippi Supreme Court held on the appeal to settle the principles of the instant case, that—

> "It was the intention of all of the parties to give the bond therein provided for and that the bond is to be construed in connection with the contract; it was designed to protect the Owner and the Contractor and that it was so dealt with by all the parties.
>
> "It will be seen from a recital of the bond itself that it referred to the contract and to the plans and specifications made a part of the contract and the bond.
>
> "This being true, it is plain, we think, that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted" (Tr. 56).

The contract documents made specific reference to the statute of Mississippi, and, regardless of whether or not that statute should be held unconstitutional as

an enforcible act, yet the parties themselves voluntarily adopted its terms into their voluntary contract and are, therefore, now bound by its terms as a provision of their contract, even if they are not bound thereunder as by a statute. *Southerly Surety Company* v. *Nalle & Co.*, in 242 S. W. (Texas) 197.

The *Nalle case* was brought on a building bond conditioned for faithful performance of the contract. The Court in discussing the case stated an established rule of law, which, we submit, is applicable to the present case now here on appeal, even in event the Mississippi statute could be held unconstitutional. The Court in the *Nalle case* said:

> "There is nothing in the record showing or tending to show that the owners in taking this bond were constrained to do so solely by virtue of said statute or that any of its terms or conditions were demanded by the owners solely by reason thereof. *There is nothing in the record showing or tending to show that the bond or any of its terms or provisions were anything other than mutual voluntary agreements and engagements of the parties.*
>
> The record in this case merely shows the bond sued on. When such bond is compared with certain articles of the statute we find that the penalty therefor is in the minimum amount and that it is payable and conditioned substantially as prescribed by them.
>
> *"Where a bond is wrongfully demanded under color of official authority or as a condition to some act, privilege or benefit to which the maker is entitled without giving any bond such bond, if given, will be held to be void for duress"* (*Dupree* v. *State*, 102 Texas 455, 471; 119 S. W.

301; *Leona Irr. Man. & Canal Co.* v. *Roberts*, 52 Texas 615, 622).

"*The general rule is that a bond, whether required by statute or not is good at common law if entered into voluntarily* and for valid consideration, and if not repugnant to the letter or policy of the law.

"A bond executed in pursuance of a statute is not necessarily void because the statute is afterwards declared unconstitutional. If entered into for a lawful purpose without duress and for a valid consideration independent of the statute, such bond may be enforced as a common law obligation" (9 *C. J.* pages 28 and 29, paragraphs 43 and 45; 4 *R. C. L.* page 55, paragraph 15; and other cases there cited).

The *Nelle case, supra,* is directly in support of the above case, and the same is supported by other Texas cases, amongst which is that of *Equitable Surety Company* v. *Stemmons*, reported in 239 S. W. 1037.

In the *Hartford Accident & Indemnity Company case* here on appeal it was established that the specifications, plans and agreement became a part of the bond and were incorporated therein and that the bond became a part of the contract of the Natchez Investment Company with Burkes, the contractor, and the bond company, and that the surety on the bond by reference to the bond and contract documents undertook on its part the performance of all the obligations of the principal contractors, Burkes.

We submit that under the wording of the contract and specifications one conclusion only can be drawn as to the intent of the parties entering into the contract and that was that the bond was to be given whereby Burkes & Company, the builders, were to

erect the Eola Hotel and were to pay for all materials and labor entering into the same, that it was the intent to incorporate into the contract and bond the wording and provisions of the statute, being Chapter 128, Laws of 1918; and we, therefore, submit further that the bond, even though Section (3) of the Statute, Chapter 128, Laws of 1918, should appear to the Court as being unconstitutional, yet the bond would still stand as a common law bond and would be enforceable although the statute might be declared unconstitutional.

The reasons for these conclusions are:

(1) That the bond in question was voluntarily entered into by all the parties without compulsion by statute, as the statute did not require the giving of any bond, but simply wrote the terms and conditions into the bond in event same should be given.

(2) There was a valid consideration paid for the bond premium.

(3) That the consideration was received by the appellant here and the benefits thereof retained by the appellant and that no tender has been made back.

(4) That the benefits accruing from the giving of the bond have been used and enjoyed by the principal, Burkes, and by their sureties, Hartford Accident & Indemnity Co., appellant here, in that by giving of the bond the principal was enabled to make use of the proceeds of the contract price and the surety has been enabled to have his principal complete the building in accordance with the plans and specifications and the liability of the surety thereby reduced *pro tanto* from

the original figure of $316,822 to a figure of approximately $60,000, the aggregate of all claims filed against the surety.

The law as announced in the *Nalle case, supra,* is in line with the holdings of this Court in *Daniels* v. *Tierny,* 102 U. S. 415, 26 L. Ed. 187, which action was on a bond authorized under the Virginia Secession Ordinance, which provided that by giving a bond the debtor might prevent the enforcement of execution against him. The Court in the case cited pronounced the statute void, but held that inasmuch as the obligor had enjoyed its benefits by obtaining a stay of execution he was estopped to question its validity. The language therein used is peculiarly applicable here:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself, for his benefit, of a constitutional law, he cannot in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such case the principle of estoppel applies with full force and conclusive effect" (*Daniels* v. *Tierny, supra*).

See also *Stevenson* v. *Morgan,* 67 Neb. 207; 93 N. W. 180; 108 A. S. R. 629.

See also *U. S. F. & G. Co.* v. *Ettenheimer,* 70 Neb. 144; 97 N. W. 227; 113 A. S. R. 783.

To the same effect it was held in *Douglass* v. *Unmark,* 77 Conn. 181, 107 A. S. R. 25, that an unsuccess-

ful plaintiff in replevin who has seized goods belonging to the defendant is estopped, together with his bondsmen in an action upon recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ of replevin.

The bond in question here was a voluntary bond and is good at common law for the reason that there was a valid consideration therefor and that there is nothing repugnant to the letter or the policy of the law of Mississippi or of the Constitution of the United States in the giving of this bond.

See *Moses* v. *U. S.* 166 U. S. 571, 586; 17 Sup. Ct. 682; 41 L. Ed. 1119.

The decision of the Supreme Court of Mississippi in this cause here can, therefore, be upheld on the grounds that the bond in question is a common law bond, regardless of the constitutionality or unconstitutionality of the statute, and the question of the legality of the statute need not be decided in order to reach the conclusion already arrived at in this case.

In conclusion, on this proposition, we have to say that counsel for appellant state in their brief that the record in this case shows that the appellant, surety company, sought studiously to avoid giving the statutors bond under Chapter 128 of the Laws of Mississippi of 1918.

We submit, on the contrary, that the record in this case shows that such was not the intention of the owner of the building, the contractors, Burkes, or of Hartford Accident & Indemnity Company, the surety, but, the contract documents controlling the recitations in the bond, it is shown clearly that it was the intention

of the parties, the owner, the contractor, Burkes, and the surety, Hartford Accident & Indemnity Company, to give the kind of bond provided for under the laws of the State of Mississippi.

Furthermore, with deference to this Court, these are questions of fact with which this Court will not concern itself. The facts were submitted to the Chancery Court of Adams County, Mississippi and by it adjudicated adversely to Hartford Accident & Indemnity Company, and this finding of fact by the Chancery Court of Adams County, Mississippi has been upheld by the Supreme Court of the State of Mississippi.

No testimony taken on the trial of this cause is before this Court in the Record whereby the decision of the lower court can be gainsaid.

POINT V.

As to the application by the Ætna Casualty & Surety Company to become a joint appellant, a motion to dismiss on this specific ground was made by appellees and served upon appellant November 30, 1931. After this motion was so thus made, the Ætna Casualty & Surety Company seeks to become a joint appellant. It may not do so, iterating the grounds of the motion, because:

(A) The Supreme Court of the State of Mississippi, wherefrom this appeal was taken, has not granted to this Company an appeal from the decision there made.

(B) The time for taking such appeal has now long since expired, and the statute has barred the right so thus to appeal; and having been barred, if the appellant is allowed to join in the appeal, the appellees desire when and if it is so thus allowed to interpose a

ples of the Statute of Limitations in this Court in virtue of the expiration of the time; the judgment of the Supreme Court of Mississippi having been rendered against the Ætna Casualty & Surety Company on February 23, 1931 (Tr., 74), and the suggestion of error having been overruled on June 15, 1931. The suggestion of error the Ætna Casualty & Surety Company did not join, it being the suggestion of error only of the Hartford Accident & Indemnity Company, filed March 21, 1931 (Tr., 83). Therefore, insofar as the Ætna Casualty & Surety Company is concerned, this judgment became final at the date first mentioned, and with reference thereto naught has been done from that time until now, and it is now too late to appeal to this Court therefrom.

WHEREFORE we respectfully submit this cause should be affirmed.

Respectfully, L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFFE,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.

By GARNER W. GREEN.

Of Counsel:

BRADLEY, BALDWIN, ALL & WHITE.

Service of the foregoing is hereby acknowledged this December 21, 1931.

ARTHUR G. POWELL,
W. CULON WELLS,
L. BARRETT JONES,
Counsel for Appellant.

(1495)

FILE COPY

DEC 2

CHARLES ELMO

IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as BUNN ELECTRIC COMPANY, et al,
Appellees

No. 333

OCTOBER TERM, 1931

MOTIONS AND CONSENTS TO MAKE AETNA CASUALTY & SURETY COMPANY A PARTY APPELLANT, AND TO AMEND PROCEEDINGS ON APPEAL, ACCORDINGLY

Dickerson Printing Co., Atlanta

IN THE

Supreme Court of the United States

No. 333

OCTOBER TERM, 1931

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

vs.

O. L. BUNN, doing business as Bunn Electric Company, The Coburn Trolley Track Mfg. Co., Gibbens & Gordin, Inc., the R. C. Lieb Company, Natchez Drug Company, National Show Case Company, Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Company, Truscon Steel Company, White Stone Company, Inc., Woodward, Wight & Company, Ltd., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Company, Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co., of Dallas, Texas, C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, St. Bernad Cypress Co., Geisenberger Bro. Drug Co., M. P. Phelan, Enochs Lumber & Mfg. Co., Southern G. F. Co., Feltus Bros. Hardware Co., Chamberlain Metal Weather Strip Co., Ingalls Iron Works, Capitol Paint & Glass Co., Mosler Safe & Lock Company, J. V. & R. T. Burkes, T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, a partnership, and J. V. & R. T. Burkes individually, New Orleans Bank & Trust Company and Natchez Investment Company, Inc.,
Appellees

Appeal from the Supreme Court of Mississippi

Now comes AETNA CASUALTY & SURETY COMPANY, which was the surety on the appeal bond in said case, on the appeal by the Hartford Accident and Indemnity Company from the decree of the Chancery Court of Adams County, Mississippi, to the Supreme Court of Mississippi, and prays the court, if it be necessary or proper that it should be joined in the appeal of said case to this Court, that it be made a party appellant, and to that end it adopts all of the proceedings by said Hartford Accident & Indemnity Company for the purposes of said appeal, and prays that it be included as a party appellant in the petition for appeal, in the assignments of error, in the bond on appeal, in the citation and in the praecipe for transcript, and in all the other appellate procedure in said case.

This, December 8, 1931.

AETNA CASUALTY & SURETY COMPANY

By Wilmot M. Smith Vice-Pres.

thur G. Powell, its Counsel

The Hartford Accident & Indemnity Company moves the Court that its appeal and the proceedings had by it for that purpose be amended by granting the prayer of the Aetna Casualty & Surety Company to be made a party appellant, as stated in the foregoing application.

This, December 8, 1931.

HARTFORD ACCIDENT & INDEMNITY COMPANY

By

W. CALVIN WELLS,
L. BARRETT JONES,
ARTHUR G. POWELL,
Its Attorneys.

Arthur G. Powell

Of Counsel

The Fidelity and Deposit Company of Maryland, the surety on the bond on appeal filed in the Supreme Court of Mississippi on July 25, 1931, by Hartford Accident & Indemnity Company for the purpose of appealing said case to the Supreme Court of the United States, consents to the amendment to the appeal and to the proceedings had therefor, as moved in the foregoing applications by the Aetna Casualty & Surety Company and by the Hartford Accident & Indemnity Company, and consents that, if said Aetna Casualty & Surety Company be made a party appellant, said bond be amended accordingly.

FIDELITY AND DEPOSIT COMPANY OF MARY

By Wm. R. Bishop, Vice President

FILE COPY

MAR 31 193

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO TAX DAMAGES.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.
By GARNER W. GREEN.

BRADLEY, BALDWIN,
ALL & WHITE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

v.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

MOTION TO TAX DAMAGES.

Come appellees herein by attorney and move the Court herein, pursuant to the provisions of Rule 30, (Former Rule 28), that Appellant be taxed with damages at a rate not to exceed Ten (10%) Per Cent, in addition to interest, because

I.

Herein the appeal taken was for delay.

II.

The appeal was frivolous.

WHEREFORE, Appellees are entitled to damages and therefor ask.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees,
By GARNER W. GREEN.

BRADLEY, BALDWIN,
ALL & WHITE,
Of Counsel.

To Messrs. Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Counsel for Appellant:

Please take notice that the foregoing motion to tax Appellant with damages not to exceed Ten (10%) Per Cent, with the annexed brief, will be presented to the Supreme Court of the United States upon the 11th day of April, 1932, or as soon thereafter as may be, for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
S. B. LAUB,
E. H. RATCLIFF,
JOSEPH E. BROWN,
W. C. MARTIN,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Appellees.
By GARNER W. GREEN.

Service of the foregoing is hereby acknowledged this March 28, 1932.

W. CALVIN WELLS,
ARTHUR G. POWELL,
L. BARRETT JONES.

MOTION TO TAX DAMAGES.

BRIEF AND ARGUMENT.

Upon February 23, 1931 (Tr. 74), Appellees recovered judgment against the Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company in the Mississippi Supreme Court. Upon March 21, 1931, a Suggestion of Error was filed, which was overruled June 15, 1931. Whereupon, on July 25, 1931, the Hartford Accident & Indemnity Com-

pany, alone, sought to appeal to this Court. On March 14, 1932, the appeal was dismissed under the well-settled rule originating as early as *Masterson* v. *Herndon,* 10 Wall., 416, 417, and uniformly since applied, as by the opinion demonstrated.

The above well-settled rule, which originated in *Masterson* v. *Herndon, supra,* was reiterated and demonstrated in the case of *Estis* v. *Trabue Davis & Co.,* 128 U. S. 225, 32 L. Ed. 437, 9 Sup. Ct. Rep. 58, which case originated in the District Court for the Northern District of Mississippi, and established the principle that on a joint judgment in Mississippi against a principal and his surety there can be no appeal to the Supreme Court of the United States without joinder of both or summons and severance.

In view of the above established rules and cases an appeal as herein could yield but one result, to-wit: Delay, and, therefore, is to be presumed that such was the purpose of the appeal.

By this delay and frivolous appeal the appellees herein have been required to file briefs and orally argue this cause before the Court whereby they have incurred considerable additional expense, costs and attorneys' fees.

Appellees have been delayed from July 25, 1931 to March 14, 1932, certainly, and further, as we are advised, by a petition to reargue, though the opinion was unanimous. As said by Mr. Justice Gray, in *Texas & P. R. Co.* v. *Volk,* 151 U. S. 79, 38 L. Ed. 80:

> "The writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay. The motion

of the defendant in error is therefore granted, and the judgment affirmed, with interest, and ten per cent damages."

Appeals dismissed come within the rule. *Slaker* v. *O'Connor,* 73 L. Ed. 259, 278 U. S. 259, Mr. Justice McReynolds said:

> "The above provisions were considered in *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 106, 57 L. Ed. 140, 143, 33 Sup. Ct. Rep. 80, and *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 233, 67 L. Ed. 961, 964, 43 Sup. Ct. Rep. 589. Together those cases determine that where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed. In the first cited case—writ of error to state court—penalty of 5 per centum was imposed upon the plaintiff in error; in the second—an appeal from federal court—the appellant was subjected to penalty of $1,500, and required to pay the costs. See also *Gibbs* v. *Diekma,* 131 U. S. Appx. clxxxvi, and 26 L. Ed. 177.
>
> "Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them.
>
> "The appeal must be dismissed. Damages of $150 payable to the appellees, together with all costs, will be taxed against the appellant."

Roe v. *Kansas,* 278 U. S. 191, 73 L. Ed. 259; *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 233, 67 L. Ed. 961, 964; *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 106, 57 L. Ed. 140, 143, 33 Sup. Ct. Rep. 80; *Southern R. Co.* v. *Gadd,* 233 U. S. 581, 58 L. Ed. 1101;

Nelson v. *Flint*, 166 U. S. 280, 41 L. Ed. 1003; *Wilson* v. *Everett*, 139 U. S. 620, 35 L. Ed. 288; *Gregory Consolidated Mining Co.* v. *Starr*, 141 U. S. 227, 35 L. Ed. 717; *Gibbs* v. *Diekma*, 131 U. S. Appx clxxxvi, 26 L. Ed. 177; *Amory* v. *Amory*, 91 U. S. 356, 23 L. Ed. 436; *Prentice* v. *Pickersgill*, 73 U. S., 6 Wall., 513, 18 L. Ed. 791; *Jenkins* v. *Banning*, 23 How. 457, 16 L. Ed. 581; 28 *Judicial Code Annotated*, Rule 30, (Former Rule 28, Note 6, et seq.).

In *Amory* v. *Amory*, *supra*, the Court used the following language:

> "We can adjudge damages, under Sec. 1010 R. S. and Rule 23, in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals and frivolous writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

Thereunder, when contrary to repeated decisions of this Court appellant appealed, thereby obviously it was, and should be so adjudged to be, solely for delay, decisions without doubt or uncertainty specifically admonishing appellant that the course pursued would not confer jurisdiction upon this Court to reverse the decree, as the Aetna Casualty & Surety Company did not appeal.

II.

Said attempted appeal was also frivolous, in this, that it presented no substantial Federal Question, whereasto, to avoid prolixity, we adopt the brief made

on the Motion to Dismiss or Affirm, (and we particularly adopt the cases cited at page 69 of the brief of appellees on the merits, wherein is cited and discussed *Ramsey* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420, and the companion case of *Aetna Casualty & Surety Company* v. *U. S. Gypsum Co.*, 39 S. W. (Ky.) (2nd) (1931) page 234, asserting,

A. There were no pleadings or proof in the record presenting a Federal question;

B. That determined by the Supreme Court of Mississippi was only a decision of the meaning as to a local contract, insofar as appellees are concerned.

WHEREFORE, Damages not to exceed Ten (10%) Per Cent are asked under the rule.

Respectfully,

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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

v.

O. L. BUNN, doing business as
BUNN ELECTRIC COMPANY, et al.,
Appellees

No. 333

OCTOBER TERM, 1931

MOTION FOR REHEARING

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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant

v.

O. L. BUNN, doing business as
BUNN ELECTRIC COMPANY, et al.,
Appellees

No. 333

OCTOBER TERM, 1931

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION FOR A REHEARING

Comes now the appellant, Hartford Accident & Indemnity Company, and moves the Court to grant a rehearing as to the opinion, orders and judgment rendered in this case on March 14, 1932, and to set the same aside and to restore the case to the docket of the Court for determination on its merits on the grounds hereinafter stated.

EXPLANATORY FOREWORD

It is inexcusable for counsel to burden the Court with a motion for a rehearing except where the situation is distinctly out of the ordinary. Our excuse for burdening the Court now with such a motion is that we know the Court regards it as unfortunate for a case asserting constitutional rights of general importance as well as of importance to the appellant to be disposed of on a point of procedure without consideration of a substantial constitutional claim.

Such an unfortunate termination has resulted in this particular case. If this result is inevitable, or if it comes about because counsel has disregarded the established appellate procedure of the Court there would be nothing further to be said; but it is the object of this motion to show that such is not the case.

We believe we can demonstrate that the dismissal is not inevitable; and that the procedure followed by counsel which has resulted in the dismissal does not show a disregard of the established appellate practice of the Court, but on the contrary is in exact accordance with specific and direct precedents in the decisions of this Court which have not been noted in the opinion dismissing this case—precedents which have not been questioned in forty years in this Court (at least so far as its published opinions show) and have been treated by the various Circuit Courts of Appeal as definitely establishing a federal appellate practice in accord with that followed by the appellant in this case.

It is, of course, possible that after further consideration the Court will believe that we are mistaken in the foregoing

statements. They are, however, made after deliberate consideration and after exhaustive investigation, in which we have endeavored to keep constantly in mind the obligation of counsel the Court as well as to the client. Hence we respectfully ask a consideration of the precedents from this Court on which the statements are based.

GROUND 1—That the Court has in this case declared and applied a new rule of appellate procedure, abolishing a method of procedure hitherto recognized by the decisions of this Court, without prior notice of an intention to do so; or else has by inadvertence overlooked the fact that the dismissal of the appeal in this case is contrary to well considered precedents in this Court, to which the Court has made no reference in the opinion.

What we mean is this: We recognize the right of this Court to announce a new rule of decision on questions of practice and to do so without formally overruling prior precedents to the contrary. But we do most respectfully insist that, out of fairness to the parties and their counsel, in the interests of justice and in accordance with the usage of this Court, this should not be done without notice or warning. We refer to the custom adopted in such cases as *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264 (cited in the opinion in this case), where the Court did not dismiss the appeal then pending before it, but announced that after a certain time in the future a contrary rule would apply.

It is our insistence that the practice, now so universally recognized in state courts and in lower Federal appellate

tribunals, that failure to join in subsequent appeal a surety on appeal bonds and on other similar bonds merely given as security for the enforcement of the judgment is not a fatal defect, ought not to be condemned without notice, especially since the rule of practice, dispensing with the joinder in such cases, is based on direct, unequivocal, hitherto unchallenged precedents in this Court.

The rule and precedent in this Court, that from a judgment or decree, though joint on its face, against a party to the cause and his surety on appeal or from any judgment or decree, which though joint in form is severable in law or in fact, a party may appeal (or formerly take writ of error) on his severable interest, without joinder of others included in the same judgment or decree, and without summons and severance, or equivalent proceeding, is established in the following (and perhaps other) cases, which are not noticed in the opinion and which are in effect overruled by it.

Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 34 L. ed. 539;

Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396;

City National Bank v. Hunter, 129 U. S. 557, 579; 32 L. ed. 752.

Winters v. U. S., 207 U. S. 564, 52 L. ed. 340;

Forgay v. Conrad, 6 How. 201, 12 L. ed. 404;

Basket v. Hassell, 107 U. S. 602; 27 L. ed. 500;

Marsh v. Nichols, 120 U. S. 595; 30 L. ed. 794; 30 L. ed. 793;

O'Dowd v. Russell, 81 U. S. 402; 20 L. ed. 857;

Amadeo v. Northern Assurance Co., 201 U. S. 201; 50 L. ed. 726;

Germain v. Mason, 79 U. S. 259; 20 L. ed. 392,

in which the Court said:

> "We have examined the record—a very confused one—but from it we gathered enough to satisfy us that the judgment of which Germain complains is such a separate judgment against him as authorizes him to ask a review of it here, without joining his co-defendant in the court below."

Todd v. Daniel, 16 Pet. 521; 10 L. ed. 1054.

Perhaps the most direct and perspicuous precedent not noticed in the opinion in this case—the precedent usually cited by courts, by text writers, by annotators and counsel as authority for the proposition that though a party and his surety on appeal bond are included, as an incident of local appellate practice, in an apparently joint judgment of the court from which the appeal lies, the party may appeal on the substantive questions of the case, without joining the surety, is the case of *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572; 34 L. ed. 539.

The essential facts in that case and in the present case are identical. There, as here, the motion to dismiss was on the ground that a surety on intermediate appeal whom the court below had included in its final judgment along with his principal—a judgment joint in form—was not included as a party to the appeal by his principal from that judgment. The court,

on the first hearing of the motion, sustained it and dismissed. Later in the term, a rehearing was sought. Though the time for the allowance of the appeal had expired, a motion to make the omitted surety a party was made with the surety's consent and cooperation—just as has been done here. The rehearing was granted. The Court reversed its former action, and overruled the motion to dismiss. It also allowed the surety to be made a party.

(At the argument of the present case, some question was raised from the bench as to whether the time for the allowance of an appeal, or writ of error—at that time two years—had expired before the motion to amend and make the surety a party in the Tolson case had expired. An examination of the original record in the office of the Clerk of this Court, subsequently made, discloses that the final judgment appealed from in that case was rendered in July, 1887, and that the motion to amend was not made until December, 1889, more than two years later. As some difficulty was encountered in the clerk's office in locating the old record in the Tolson case, we call attention to the fact that it may be found filed under the later docket number given it when it was restored to the docket for argument, No. 229, October Term, 1890.)

Throughout the more than forty years which have elapsed since the Tolson case was decided, no case, so far as our search has disclosed, has ever been dismissed in this Court for failure to join the surety on appeal, though joined in joint judgment with his appealing principal; nor, so far as we can find, has the binding authority of the Tolson case ever been questioned. As shown in our original briefs on the question, it has become the basis for the established practice in the various U. S. Courts of Appeals.

GROUND 2—That the criticism in the opinion in this case of the ruling found in the opinion of Judge Lurton in *The New York*, 104 Fed. 561, 563 (U. S. C. A. 6th Circ.), that "though joint in form, the decree was separable in law and in fact and, therefore, the surety was not a necessary party,"—the criticism being that "considering former opinions of this Court and the long established practice, we cannot accept as applicable to appeals here the doctrine approved in *The New York*"—is not well founded; that the decisions of this Court are the basis for the rule announced in *The New York* that in considering a motion to dismiss for failure to join (or to summons and sever) a party included in the final judgment, the Court looks beyond the form of the judgment to see whether, though apparently joint in form, the judgment (or decree) was separable in law or in fact.

Judge Lurton, in *The New York*, borrowed the phrase "in law and in fact" and made the distinction out of the case of *Hanrick v. Patrick*, 119 U. S. 156, 163, 30 L. ed. 396. In that case, in overruling a motion to dismiss a writ of error on the ground of non-joinder, as a plaintiff in error, of one included in the apparently joint final judgment appealed from, this Court had said: "The judgment must be regarded as joint in form only, but severable in fact and in law." This Court pointed out that while the rule was especially applicable to decrees in equity, there was no reason why it should not be applied to judgments at law, when the circumstances require. Of course, it is in mind that the appeal in the present case is from a decree in equity.

Also, just prior to Judge Lurton's opinion in *The New York*, the Chief Justice, in this Court, in overruling a similar motion to dismiss in an equity case, had made the distinction that "the decree was severable in fact and in law." *City National Bank v. Hunter*, 129 U. S. 557, 579, 32 L. ed. 752, 760.

We respectfully submit that not only is the reasoning in the opinion in *The New York* sound and cogent, but that the decision is grounded in the precedents of this Court, and is consistent with the precedents of this Court, both before and after its rendition.

For example, in *Winters v. U. S.*, 207 U. S. 564, 52 L. ed. 340, though the decree was joint in form, the Court looked back through the record, and determined that the controversy was severable in fact, and refused to dismiss the appeal brought by one defendant, without joining the others.

(See also the cases cited under Ground 1 hereof.)

We cannot afford to make the direct statement, without verifying the facts more accurately than we have had opportunity of verifying them, that in the majority of the cases which have come to this Court in the last fifty years, from jurisdictions (including Federal courts, conforming to the State practice) in which it is customary to include a surety on appeal bond in the final judgment or decree, the surety on appeal has not been joined in the appeal or writ of error in this Court, with no notice taken of the fact, nor any adverse criticism made of the practice in this Court; though we have reason to believe that this is true.* But we do feel assurance,

*See list of cases in the footnote near the end of this motion.

in saying that so far as the published opinions of this Court disclose, no appeal or writ of error has ever been dismissed for failure to join as co-appellant a surety on appeal or for failure to join as co-appellant any other party to a judgment or decree, where the judgment or decree, though joint in form, was severable in law or in fact, and this fact was brought to the attention of the Court.

In making this statement, we do not overlook *Estes v. Trabue*, 128 U. S. 225; 32 L. ed. 437, or *Mason v. United States*, 136 U. S. 581. In those cases there was no question but that the judgments appealed from were joint in law and in fact. They have frequently been distinguished on that ground by the various U. S. Courts of Appeals in the cases cited in our original briefs. The sureties in those cases were not sureties on appeal, but were parties defendant from the beginning of the case, with right to defend, to assign error and appeal. At the time *Estes v. Trabue*, which came from Mississippi, was decided, under the statutes of Mississippi and the decisions of the Supreme Court of the State, the judgment in such cases was joint; and under the then local practice the sureties were necessary parties to an appeal under the state law. In *Mason v. United States*, the surety attempted to appeal without joining the principal.

There was nothing in the record in the case of Estes on which the Court could have predicated a severability; but in the Tolson case, rendered about two years later, when the severability of the issues was called to the attention of the Court, it refused to follow the Estes case as being applicable.

As to the other cases cited in the opinion in this case:

In *Davis v. Mercantile Trust Company*, 152 U. S. 590, 38 L. ed. 563, the dismissal was for failure to join parties adversely interested as appellees—not for failure to join a party as a co-appellant.

In *Garcia v. Vela*, 216 U. S. 598, 54 L. ed. 632, there was no question but that the party not joined as co-appellant was jointly interested both in the judgment and in the controversy and also in the question the appealing party sought to raise.

This motion for rehearing assumes the correctness of the general rule quoted from *Hardee v. Wilson*, 146 U .S. 179, 180, 36 L. ed. 933, that "undoubtedly the *general rule* is that all the parties defendant, where the decree is a joint one, must join in the appeal." The very statement of the rule, however, implies exceptions. The Court in that case determined the joint nature of the judgment from an inspection of the entire record and the nature of the questions presented. The Court also points out that the notion of summons and severance grew out of cases where two or more parties had a joint interest in a cause of action or in a substantial right. There is nothing in that case which in the slightest indicates a departure from the rule announced in those decisions of this Court, that though a judgment or decree be apparently joint, a separate right of appeal exists, if the judgment or decree be severable in law or in fact.

GROUND 3—That the Court, in stating in the opinion that the surety in this case might have appealed, has overlooked the fact that, under the decisions of this Court, if the surety on the appeal bond, in this case, had undertaken to appeal, either

alone, with or without summons and severance, or jointly with its principal, it would have been the duty of the Court to have dismissed the appeal, as to the surety, upon its coming to the attention of the Court that the surety had not raised in the court below—and could not have raised—any of the constitutional questions on which the jurisdiction of the Court in this case depends.

Sully v. American National Bank, 178 U. S. 289, 297; 44 L. ed. 1072, 1075.

Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 25; 68 L. ed. 541, 545.

Davis v. Preston, 280 U. S. 406; 74 L. ed. 514.

Smith v. Indiana, 191 U. S. 138; 48 L. ed. 125.

We assume that any party which would be dismissed from the appeal, if joined therein, is not a necessary party to the appeal, even from the most formal standpoint.

GROUND 4—That the Court has overlooked the fact that, under the established precedents of this Court, if a judgment be both joint and several, any person adversely affected may have his separate appeal.

It is only where lack of severability exists that the rule exists requiring the joinder in appeal of others joined in the judgment. We recognize that often, when it has not been necessary to make this distinction, the rule has been stated in the form that one included in a joint judgment cannot appeal

alone without summons and severance or like proceedings; but from the earliest days this Court has recognized the true meaning of the rule to be as first stated above.

An examination of the facts in *Cox and Dick v. United States*, 6 Pet. 172; 8 L. ed. 359, will show an application of this principle; and this is clarified by the statement in *Todd v. Daniel*, 16 Pet. 521; 10 L. ed. 1054, that "In the case of Cox and Dick v. The United States, no doubt was entertained by this Court that a writ of error might be entertained by the defendants severally where the judgment operated under the laws of Louisiana as a several as well as a joint judgment, although they might have united in the writ of error." (Note that this is also authority for the proposition that for purposes of appeal the laws of the State, where rendered, are controlling as to whether a judgment is joint only or is also joint and several.)

GROUND 5—That the Court overlooked the fact that the final decree of the Supreme Court of Mississippi in this record is in form not a joint judgment only; but is on its face a several judgment against appellant and its surety on appeal—that in fact it consists (R. 75) of three parts: (1) a judgment reversing the decree of the Chancery Court as to one party and dismissing the action as to that party; (2) a judgment affirming (with the exception stated) the decree of the Chancellor—a decree to which the surety on appeal was in no wise a party; (3) an administrative judgment, providing for the enforcement of its decree against the present appellant by condemning the security it had offered

on appeal (i. e., its appeal bond) by rendering a judgment against the appellant and its surety on that bond.

The situation is not different from what it would be if a court of equity had a bill before it to foreclose a mortgage. It would first render a decree foreclosing the mortgage and fixing the mortgage debt; and then, as an administrative matter, provide for the sale of the mortgaged property.

Just as the decree of foreclosure is final and supports appeal on the merits of the controversy by the main defendant alone, despite the fact that the court's action may be interlocutory only so far as relates to the provisions of the decree concerning the methods by which the Court proposes to enforce its decree (See *Forgay v. Conrad*, 6 How. 201; 12 L. ed. 404; *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362; 58 L. Ed. 1001) just so the decree in this record was final and such as to support an appeal, the moment the Supreme Court of Mississippi affirmed the decree of the Chancery Court against this appellant; nor, it seems to us, is the right of this appellant to appeal from that decree and to appeal without joining any one else, affected by what the Court may have later done, though in the same document, by way of administrative provisions designed to make effective what it had already adjudged against the present appellant alone, it entered another and further joint judgment.

That the liability on the cause of action and the liability on the bond given to secure the final judgment are so separate as to give a valid basis for separate appeals if necessary. See *Ex parte Sawyer*, 21 Wall. 235; 22 L. ed. 617.

We have in another division of this motion distinguished *Estes v. Trabue*, 128 U. S. 225; 32 L. ed. 437, on other grounds; but one feature of it is especially pertinent to the ground now under discussion; for in that case the Court points out that the judgment then under review could not be regarded "as containing a separate judgment against the claimants, and another separate judgment against the sureties," thus implying that the rule there announced would not apply if the judgment were in two or more parts.

Also if the Court applies its judicial cognizance of the laws of Mississippi to this judgment (see next ground of this brief) it knows that as to the surety on the appeal bond the liability established in the final judgment is contingent only (See *Wilson v. City of Lexington*, 153 Miss. 209; 119 So. 795) and this case is thereby distinguished from Estes v. Trabue, wherein one of the grounds of holding the surety on the bond then sued on to be a necessary part to the appeal by the principal was that there was nothing whereupon the surety's liability in that case could be regarded as contingent.

GROUND 6—That since the Court may, by exercising its undoubted power to take judicial cognizance of the laws of Mississippi, know that the judgment before it is a severable as well as a joint judgment, irrespective of its form, it is the duty of the Court to exercise that power and to retain jurisdiction of the case.

More immediate to this point than even the holding in *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84, 90; 43 L. ed. 623, 625, that the effect of state

court judgments is a matter of state law, and the statement in *Kenney v. Craven*, 215 U. S. 125; 130; 54 L. ed. 122, that "the scope and effect of a state judgment is peculiarly a question of state law," is the ruling in *Todd v. Daniel*, 16 Pet. 521; 10 L. ed. 1054, that if under the state law a judgment is several as well as joint, any defendant may prosecute his separate appeal to this Court.

Under the laws of Mississippi, the final judgment in this case is several as well as joint. (It was conceded at the argument, that such is the law of Mississippi, but it can be easily verified by the authorities.)

Mississippi Code, 1930, §§2027, 2028.

J. B. White's Garage v. Boyd, 149 Miss. 383; 115 So. 334;

National Surety Co. v. Austin Machinery Co., 35 F. (2) 842, 845.

National Surety Co. v. LaFlore County, 262 Fed. 325.

To ask the Court to apply its judicial cognizance to this judgment is not to ask the Court to "explore the record to ascertain what issues were relied upon in the court below." To know whether any judgment is a joint judgment, even in the matter of form, requires the exercise of the Court's cognizance of the law.

However, we respectfully insist that, as shown by the cases cited in connection with other grounds hereof, this Court has not hitherto refused to go into the record to determine whether

there is severability in a judgment apparently joint on its face.

Nor do we see how, in many cases, the Court could exercise its undoubted jurisdiction without looking beyond the face of the judgment to tell whether the judgment is joint or several, or even to tell who the parties to it are. For example, a trial court sustains demurrer to a petition or a complaint and dismisses it. The Supreme Court of the State affirms the judgment and its judgment is in the form commonly used in appellate courts, that is to say, the judgment is entitled in the short form commonly employed in docketing, followed by a recitation of consideration of the appeal and a simple ordering that "the judgment of the court below be affirmed." This Court in such cases must look to the pleadings, at least, to construe the judgment. In fact, the rule is uniform that judgments must be construed in connection with the record—a rule the wholesomeness of which has never been questioned.

GROUND 7—That a substantial difference exists between allowing an appeal after time for appeal has expired and allowing an amendment perfecting an appeal allowed in time, but defective in some technical point.

The Tolson case, supra, is direct, unequivocal, exact authority for the point that an amendment may be allowed in this Court joining the surety on appeal where the principal has appealed in time but the amendment is not offered till time for appeal has expired.

The reconciliation, it seems to us, between the Tolson case and other cases, such as *Rust Land Co. v. Jackson*, 250 U. S. 71, and *Toledo Co. v. Computing Scale Co.*, 261 U. S. 399, is that no matter in what form the application comes, if it be truly and in substance an effort to appeal without anything having been done within the prescribed time which can be considered as an attempt to allow an appeal, the application must be denied; but that if the application be merely to perfect in some formal point an appeal which has been allowed in time, it may be granted, despite the lapse of the statutory period.

If the application comes in the form of a motion to amend, we assume that the rule applicable generally to amendments applies, namely, that if the amendment attempts to introduce a new cause of action or a new right (or as applied to appeal it is more accurate to say, a new ground or basis of appeal) it does not relate back to the beginning of the proceedings; but if it merely cures some defect or delinquency, especially if the defect be of form rather than of substance, it does relate back.

If the surety on appeal be a necessary or proper party to an appeal to this Court, in a case such as this, where the constitutional questions which constitute the sole basis on which the jurisdiction of this Court is, or can be invoked, relate solely to the party which has been allowed a timely appeal, an amendment to make the surety a party to the appeal is not an amendment introducing a new right nor a new basis of appeal, nor which in any otherwise changes the appeal in substance, but is merely an amendment to perfect the appeal in a matter of form.

The principle is well established that if, in the time prescribed, any order or action is taken by the court or judge having power to allow an appeal (or, of old, a writ of error) which indicates a bona fide effort to comply with the statutes and rules on appellate procedure, the jurisdiction of this Court attaches, and from that time on this Court has the power to allow delinquencies and omissions to be cured; and the history of this Court is that as to such matters it has been highly non-technical.

Beaumont v. Prieto, 249 U. S. 554; 63 L. ed. 770;

Southern Pine L. Co. v. Ward, 208 U. S. 126; 52 L. ed. 420.

The Act of Congress (U. S. Code Title 28, § 873, R. S. § 1005) is construed in *Bondurant v. Watson*, 103 U. S. 278; 26 L. ed. 447, as conferring jurisdiction on this Court to perfect the appellate procedure by amendment whenever a writ of error "has been colorably issued."

For a full review of the statutory authority of this Court under the statute, see *Walton v. Marietta Chair Co.*, 157 U. S. 342; 39 L. ed. 725.

See also *Texas & Pac. Ry. Co. v. Kirk*, 111 U. S. 486; 28 L. ed. 481.

GENERALLY

The opinion in the present case refers to possibilities of confusion, as a basis for condemning the appellate procedure taken in the case. May we not call to the attention of the

Court the confusion and the difficulties which would confront the parties and their counsel and probably the Court, when, in a case such as this, they undertook to join the surety on the appeal bond with the party to the controversy, the invasion of whose constitutional rights constitutes the basis of the appeal? In appeals of this kind, the assignments of the error—the specification of the constitutional right of the appealing party which is claimed to have been invaded—the allegations to show that the excepting party stands in such relation to the alleged violation of the Constitution as that he is entitled to challenge the validity of the law, judgment or whatever it be that is challenged—are the very gist of the appeal. Shall the surety, none of whose constitutional rights have been invaded, assign error on constitutional points with which he has no legal concern? Would joint assignment of error by two parties be good where one of them has the right to make the constitutional question and the other has not? Would not the burdens of the Court be added to because cautious counsel, by reason of these doubts, would either file duplicate assignments of error to present the questions severally as well as jointly; and in some cases take two or more appeals, on the theory that if one failed the other would be held good? It is within the knowledge of the Court that following the warning of the Court in *Norfolk Turnpike Co. v. Virginia*, the Court was thereafter burdened with two writs of error—one good and one bad—in cases where counsel were in doubt.

May we not respectfully suggest that if the Court thinks it wisest and best to depart from the precedent of the Tolson case, or to lay down any new rule on the subject, it is in the interests of justice that this should be done by the adoption

of an amendment to the rules of the Court, to take effect after a reasonable time in the future, rather than by the dismissal of the present appeal, in which counsel have followed the practice which the Tolson case certainly sanctions, and which, since the Tolson case, the other Federal appellate tribunals have so fully sanctioned?

We are far from asserting that the effect on the self-esteem or professional pride of counsel should influence the judgment of this Court, and yet the opinions of this Court throughout its history show that where counsel have made an honest effort to comply with the rules of the Court, the Court has been reluctant, especially in doubtful cases, to render an opinion so phrased as to reflect on their professional skill.

If counsel in this case have been guilty of a delinquency in procedure, it is merely because they have been misled by the precedents of this Court—precedents which have also misled the judges of the United States Courts of Appeals in several circuits. In preparing the appeal, counsel, out of deference to the Court and out of a desire to lighten its labors, took great pains to isolate the sole constitutional point on which the appeal rests from a voluminous mass of record and questions in the court below and to simplify the appeal in every other permissible respect. If counsel erred, it was not through negligence, or lack of study of the authorities, but through lack of skill and ability to understand them.

And yet the present opinion leaves them under the embarrassment of having written down permanently against them in the reports of this Court a decision which, to the casual reader at least, carries the impression that they ha.

failed to observe in their practice a plain, unbroken line of precedents.

Therefore, are we not justified in asking that, if it be the intention of the Court to abrogate the practice permitted under the precedents on which we have relied, that the abrogation be not applied in the present case; even though this case be used as an opportunity to notify the bar that the practice will not be recognized in the future?

Therefore, we pray that the Court do revoke and set aside its judgment, dismissing the appeal in this case, and, if it be deemed necessary or appropriate that the Aetna Casualty & Surety Company be joined in the appeal, that the order or judgment refusing the motions to that end be vacated and set aside; that the motion to dismiss be overruled and denied; and that the Court do restore the case for determination on its merits.

As to Appellees' Motion to Reopen the Judgment, and to Assess Damages:

While the appellant's motion for a rehearing was in course of being printed, opposing counsel served copy of a motion by appellees for a reopening of the judgment of dismissal for the purpose of including an award of damages under Rule 28 (3). We, of course, resist the reopening for that purpose.

The rule allowing damages where the appeal is "merely for delay" is quite salutary; but it has never been used, and, of course, should never be used to deter litigants from appealing to this Court for the protection of their constitutional

rights which they in good faith believe to have been invaded.*

Certainly no solvent surety company, as a party having another solvent surety company bound, as surety, for the

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*Able opposing counsel is hardly in a position to charge that the question of the effect of non-joinder of the surety on appeal is so well settled as that the omission to join is evidence of bad faith and of appeal for mere delay, since in the case of *Magnolia State B. & L. Assn. v. Miller*, 282 U. S. 803; 75 L. ed. 722, in which there was a judgment in the Supreme Court of Mississippi in substantially the same form as here involved (i. e., first a judgment affirming the judgment of the trial court, followed by a judgment apparently joint against the appellant and the surety on the appeal bond for a given sum of money, plus interest, damages and costs), he was counsel for the appellant and did not join the surety on appeal, when he appealed to this Court. The case was dismissed for lack of substantial federal question and not on the question of non-joinder.

Counsel for the present appellees were likewise counsel for the plaintiff in error in *Hattiesburg Grocery Company, v. Robertson,* 260 U. S. 710, 67 L. ed. 475, and did not make his surety on appeal a party to the writ of error. The writ of error was dismissed on other grounds.

In the case of *Millsaps College v. Jackson,* 275 U. S. 129; 72 L. ed. 196, the judgment of the Supreme Court of Mississippi followed the usual form (i. e., first a judgment of affirmance and then a judgment, apparently joint, against the appellant and his surety on supersedeas bond for the costs in both courts, there being no other monied liability involved). Counsel for the appellees in the present case was counsel for the defendant in error in that case. We are informed by the Clerk of this Court that while the record shows no motion to dismiss, counsel for defendant in error devoted three pages of his brief in this Court to the argument that this Court was without jurisdiction because the surety on appeal was not joined in the

judgment with a third solvent surety company on its supersedeas bond in this Court, is going to seek to delay the payment of a judgment which is bearing interest on the amount

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writ of error. This argument was ignored by the Court, for in the opinion by Mr. Justice McReynolds there is no reference to it, and the case was decided on its merits.

We have made an attempt to check from the records in the office of the Clerk of the Supreme Court of Mississippi the history of the cases decided by that court which have been brought to this Court in the last ten years. The check we have undertaken to make is incomplete and subject to possible error because of a loss of a considerable portion of the records, but our investigation indicates that in all these cases the judgment in the Supreme Court of Mississippi was in the form commonly employed by that court in affirming a lower court, including the apparently joint judgment against the appellant and his security on appeal; (of course if there was a judgment of reversal, there would be no judgment against the surety on the appeal bond) and that (with the exception of one case) in the appeal or writ of error or application for certiorari to this Court, the surety on appeal was never joined in the appellate proceedings to bring the case to this Court; and that in none of these cases has this Court declined jurisdiction on the ground of the non-joinder of the surety on appeal.

Reference is had to the following cases in addition to those mentioned above (a list which is, however, not exhaustive):

Memphis & C. R. Co. v. Pace, 282 U. S. 241; 75 L. ed. 315.
Superior Oil Co. v. Mississippi, 280 U. S. 390; 74 L. ed. 861.
C. & G. R. Co. v. Miller, 283 U. S. 96; 75 L. ed. 861.
G. M. & N. R. Co. v. Touchstone, 276 U. S. 592; 72 L. ed. 721.
Swayne v. Hattiesburg, 276 U. S. 599; 72 L. ed. 724.
A. & V. R. Co. v. J. & E. R. Co., 271 U. S. 244; 70 L. ed. 928.
L. & N. R. Co. v. Garfield, 264 U. S. 576; 68 L. ed. 857.
Davis v. Green, 260 U. S. 349; 67 L. ed. 299.
First Nat. Bank v. Adams, 258 U. S. 362; 66 L. ed. 661.

at the rate of 6% per annum, by incurring the expense of an appeal to this Court, unless very strongly advised that the appeal is meritorious. If the appeal be unsuccessful the appellees lose nothing. They are getting 6% interest on their principal, their interest, their damages and their attorneys' fees and costs allowed them in the court below. On the other hand, unless the appeal succeeds, the appellant has lost heavily by the delay, not only in costs and expenses, but in added interest; for no insurance or surety company can earn 6% on its investments from which it must pay losses.

To charge counsel with bringing an appeal to this Court for mere delay is a reflection on their professional probity, but to charge it in this case, in the circumstances stated, is also a reflection on their intelligence and the intelligence of their client.

Certainly there was nothing in the attitude of the Court, at the oral argument of the case, to give opposing counsel any confidence in their point, that the constitutional question on which the appeal is based was considered as frivolous by the Justices who sat at the hearing.

In fact, there is much to support the suspicion that counsel for the appellees are serving their motion merely to deter the appellant from pursuing its right to bring its motion for rehearing to the attention of the Court, lest it be granted and the case be decided on its merits.

Our confidence in our motion and in the merits of our case if the motion be granted and our confidence in the Court are

such as to make us feel that it is our duty to ourselves, to our client and to the Court itself to present and urge our motion for a rehearing.

Respectfully submitted,

MARION SMITH,
L. BARRETT JONES,
W. CALVIN WELLS,
CHAS. S. REID,
MAX F. GOLDSTEIN,
ARTHUR G. POWELL,

Attorneys for the Appellant.

Arthur G. Powell .....
Of Counsel

I certify that the foregoing motion is presented in good faith and not for delay.

Arthur G. Powell .....
Counsel for Appellant

SUPREME COURT OF THE UNITED STATES.

No. 333.—October Term, 1931.

Hartford Accident & Indemnity Company, Appellant, *vs.* O. L. Bunn, Doing Business as Bunn Electric Company et al.	Appeal from the Supreme Court of the State of Mississippi.

[March 14, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

October 18, 1926, J. V. & R. T. Burkes agreed with the Investment Company, owner of certain land in Natchez, Mississippi, to construct a hotel thereon. The contract contains the following clauses—

"Article 30. Guaranty Bond.—The Owner shall have the right, prior to the signing of the contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto it shall be paid by the Owner."

"Obligations of Bondsmen.—The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder."

October 20, 1926, the Burkes gave a bond for $316,822.00, payable to the Investment Company with appellant as surety. Among other things this provides—

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract)

dated October 18th, 1926, To construct 'Eola Hotel' building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof. Now, therefore, the condition of this obligation is such that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the surety, upon the following express conditions, which shall be precedent to the right of recovery hereunder:"

"1." . . .

"11. No right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee named herein; and the obligation of the surety is and shall be construed strictly as one of suretyship only."

Payments to the contractors were made as required by the building contract but they failed to satisfy claims for material furnished by Bunn Electric Company and others. The latter notified the Investment Company. Thereupon, it instituted a proceeding in the Chancery Court, Adams County, Mississippi, against the contractors, the appellant Hartford Accident & Indemnity Company, and many unpaid materialmen. The bill prayed for a decree declaring the indemnity bond to be one for faithful performance of the building contract and subject to the rights and liabilities provided by Section 3,* Chapter 128, Mississippi Laws of 1918 (Sec-

*Chapter 128, Mississippi Laws of 1918. "Sec. 3. That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; . . ."

tion 2598, Hemingway's Miss. Code 1927); also for judgments in favor of those who had furnished materials, etc.

The materialmen answered. Also by cross bill and interventions they set up their claims and asked for judgments against the contractors and appellant here, surety upon the bond. The Chancellor gave judgments in favor of the cross-complainants as prayed. The Indemnity Company appealed. The Supreme Court approved upon the view that Section 3, Chapter 128, Mississippi Laws 1918, applied and controlled the obligation of the bond. It ordered that the materialmen severally "do have and recover of and from the appellant Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond," the sums found to be due them.

Upon petition of the Hartford Accident & Indemnity Company alone, the Chief Justice of Mississippi allowed an appeal to this Court July 25, 1931. The Aetna Casualty & Surety Company did not join in the appeal; there was no summons and severance nor any notice equivalent thereto.

The assignment of errors challenges the validity, under the Federal Constitution, of Section 3, Chapter 128, Mississippi Laws, above cited, as construed and applied.

December 4, 1931, the appellees entered a motion here to dismiss the appeal. They maintain that the judgments in the Mississippi Supreme Court against appellant and Aetna Casualty & Surety Company were joint; the latter Company did not join in the appeal; there was no summons and severance; consequently this Court is without jurisdiction.

December 23, 1931, appellant and the Aetna Company asked that the latter be made party to the appeal and for proper amendments to that end.

The motion to amend must be overruled. The motion to dismiss is sustained.

The challenged judgment became final June 15, 1931, more than six months before the Aetna Company applied here for permission to become a party to the pending appeal. If this application and the accompanying motion to amend were granted, the practical effect would be to permit an appeal by a party to a judgment after the prescribed time had expired.

The statute (Act of Feb. 13, 1925, Chap. 229, Sec. 8, 43 Stat. 940; U. S. C. A. Title 28, Sec. 350) provides—"No writ of error,

appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, . . ." Passage of the three months' period extinguished the right to grant an appeal. *Rust Land Co.* v. *Jackson,* 250 U. S. 71, 76; *Toledo Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418.

The judgment is joint in form and no reason appears why either or both of the parties defendant therein might not have appealed to this Court and submitted claims of error for our determination. In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty.

Haseltine v. *Central Bank,* 183 U. S. 130, 131—"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. . . . While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher,* they might have sued out a writ of error at once."

Norfolk Turnpike Co. v. *Virginia,* 225 U. S. 264, 268, 269. The question was: To which state court should the writ of error run? This Court said—"The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the

court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several States on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court susceptible of being reviewed here, and the confusion which arose ultimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from departing from the face of the record and deducing the principle of finality by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule as applied to a question like the one before us is, we think, apparent by the statement which we have made concerning the rule in the *Crowe Case* and the previous decisions."

See *Estis* v. *Trabue*, 128 U. S. 225, 229; *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, 101; *Second Nat'l Bank* v. *First Nat'l Bank*, 242 U. S. 600, 602; *Bruce* v. *Tobin*, 245 U. S. 18, 19; *Matthews* v. *Huwe*, 269 U. S. 262, 264.

Masterson v. *Herndon*, 10 Wall, 416, 417, held—"It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. . . . One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obli-

gation, or on account of the same cause of action, it being joint in its nature."

In *Estis* v. *Trabue,* 128 U. S. 225, an attachment was levied upon certain personalty. After the return Estis, Doan & Co. claimed the property and they gave a forthcoming bond with two sureties. The challenged judgment ruled "that the plaintiffs recover of the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond, the sum of six thousand and three hundred dollars, together with the costs, etc." This Court held—"The judgment is distinctly one against 'the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer,* 21 Wall. 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Mason v. *United States,* 136 U. S. 581. A postmaster and the sureties on his official bond were sued jointly. He and some of the sureties appeared and defended. The suit was abated as to two of the sureties, who had died. The others defaulted, and judgment of default went against them. On the trial there was a verdict for the plaintiff, whereupon, July 14, 1886, judgment was entered against the principal and all the sureties. The sureties who had appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default and the record came here. May 5, 1890, and after expiration of the two years within which the statute then permitted the suing out of such writs, the plaintiff in error moved to amend the writ by adding the omitted parties as complainants, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed.

Hardee v. *Wilson,* 146 U. S. 179, 180, cited earlier cases and declared—"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal." See also *Davis* v. *Mercantile Trust Co.,* 152 U. S. 590; *Garcia* v. *Vela,* 216 U. S. 598, 601; Hughes' Federal Practice, Sec. 6153.

The New York, 104 Fed. 561, (Court of Appeals, Sixth Circuit, October 13, 1900) is said to support the view that in the circumstances here presented summons and severance was unnecessary. The proceeding was a cause in admiralty. The surety upon a stipulation for release of the vessel did not join in the appeal. Upon motion to dismiss, the court said—"It is well settled that all parties against whom a joint judgment or decree is rendered must join in proceedings for review in an appellate court, or that it must appear that those who have not joined had notice of the application for the appeal or writ of error, and refused or neglected to join therein." But, it ruled that, though joint in form, the decree was separable in law and fact and, therefore, the surety was not a necessary party to the appeal.

Considering former opinions of this Court and the long established practice, we cannot accept as applicable to appeals here the doctrine approved in *The New York.* It is out of harmony with *Estis* v. *Trabue, supra,* and other cases cited above. We cannot undertake to explore the record to ascertain what issues were relied upon in courts below. So to do would lead to uncertainty and unfortunate confusion. We must accept the terms of the judgment as entered. As pointed out above, this is the approved practice when it becomes necessary to determine whether a judgment is final or to what court a writ of error should run. Like reasons apply and control here.

The appeal must be dismissed.

Dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.